Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fifth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the largest personal injury award affirmed on appeal in United States history: a $290 million punitive damage verdict in a product liability lawsuit that arose from a single traffic accident, and that was based on an alleged defect in a vehicle designed more than a quarter-century ago. The award is 63 times the compensatory award, 362 times the maximum available civil fine, and 29,000 times the maximum available criminal fine. The questions presented are:

1. Whether, in reinstating a $290 million verdict to punish an automaker for a 25-year-old design feature that surpassed federal safety standards, comported with industry custom, and had never before been found defective, the California Court of Appeal improperly nullified the three excessiveness guideposts articulated in *BMW v. Gore*, 517 U.S. 559 (1996), and produced an award that violates due process.

2. Whether the California Court of Appeal erred by holding, in conflict with *BMW* and *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002), that a single California jury could use its verdict to deprive petitioner of its total nationwide profits from sales of the product at issue.

3. Whether, in applying the *BMW* guideposts *de novo* as required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the California Court of Appeal erred by holding, contrary to the decisions of other courts, that reviewing courts should give conclusive weight to all findings of fact that the jury *might* have made, rather than findings the jury *must* have made, and by deferring to what the court acknowledged was a "huge" and "somewhat arbitrary" punishment.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiff Juan Romo, in addition to bringing suit in his individual capacity, is proceeding as guardian ad litem for his sisters Evangelina and Maria Romo, and as administrator of the Estates of Ramon, Salustia and Ramiro Romo.

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ford Motor Company ("Ford") respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS AND ORDERS BELOW

The court of appeal's June 28, 2002 opinion reinstating the $290 million verdict (Pet. App. 1a-41a) is reported at 99 Cal. App. 4th 1115. The trial court's new trial order setting aside that verdict (Pet. App. 42a-46a) is unreported.

JURISDICTION

The court of appeal entered its judgment on June 28, 2002. The California Supreme Court denied Ford's timely petition for review on October 23, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST., amend. XIV, § 1.

The Commerce Clause provides: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. CONST., art. I, § 8, cl. 3.

STATEMENT OF THE CASE

This case, along with the petition in *Ford Motor Co. v. Smith*, No. 02-____ ("Ford's *Smith* Pet."), which is being filed contemporaneously, graphically illustrates how, in the product liability context, lower courts are nullifying this Court's decisions in *BMW* and *Cooper Industries*.

Adopting the approach of many lower courts, the court of appeal invoked the fact that this is a product liability case involving personal injury to justify its evasion of all three *BMW* guideposts, and it then reinstated a $290 million verdict that the trial judge had overturned as "fundamentally suspect" and tainted by juror misconduct reflecting bias and

prejudice. The court branded Ford's conduct "grossly reprehensible" without regard to Ford's good faith basis for believing its design decisions were lawful. Pet. App. 38a. The court held that the *BMW* ratio guidepost is of "reduced . . . importance" in wrongful death cases, and pronounced the third guidepost—comparable penalties—wholly "inapplicable." Pet. App. 39a. The court held that Ford's "enormous monetary resources" provided "fair notice" that such a huge fine could be imposed (*id.* at 36a)—contradicting other courts in the process—and expressly rejected Ford's argument that it violated *BMW*'s ban on extraterritorial punishment to premise the punitive award on Ford's nationwide sales and overall profits on the vehicle, Pet. App. 38a-39a & n.3, thus creating a direct conflict with the Ninth Circuit's recent decision in *White*, 312 F.3d 998. The California Supreme Court denied review by a 4-3 vote. Pet. App. 47a-48a.

This Court's ruling in *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (argued December 11, 2002), may well address many of the issues raised by this petition, and the Court should at the very least hold this case pending its decision in *State Farm*. But this case also presents the Court with a unique opportunity to resolve important, recurring, and distinct questions that have divided and confused the lower courts regarding the meaning of *BMW* in the product liability context, an area where juries have returned a flood of massive punishments in recent years. Plenary review by this Court is warranted.

1. This case arises from a single accident involving a 15-year-old used 1978 Ford Bronco. On June 20, 1993, the Romo family had been driving all night when another vehicle cut off their Bronco on a California highway. The Bronco's driver, Juan Romo, swerved to the right, then back to the left, crossing both lanes of traffic at about 65 miles per hour and plowing onto the dirt shoulder of the road along the median. When he jerked the Bronco sharply to the right at about 50 miles per hour, it rolled over "several times." Pet. App. 2a. Ramon and Salustia Romo and their son Ramiro were killed, and Juan, Evangelina, and Maria Romo were injured.

Plaintiffs brought strict product liability and negligence claims against Ford, alleging that the Bronco's roof was defectively designed and manufactured because it did not withstand the forces generated by the rollovers. Plaintiffs also alleged that Ford had negligently failed to warn consumers of that purported defect.

It was not disputed that the 1978 Bronco's roof—the front third of which was made of metal, the rear two-thirds of removable fiberglass—was comparable to the designs of other sport utility vehicles ("SUVs") of that era, including the Jeep and the International Harvester Travelall. Reporter's Transcript ("RT") 2517-19, 2592, 6815-16. Further, although the 1978 Bronco had been designed a quarter-century before trial, at a time when there was no federal roof strength requirement for SUVs such as the Bronco, it was undisputed that the 1978 Bronco's roof was strong enough to surpass by 100 percent the federal government's then-existing roof strength requirements for passenger cars. RT 6864-67. In fact, the 1978 Bronco outperformed by 30 percent *today's* roof strength standard for SUVs, which the National Highway Traffic Safety Administration ("NHTSA") did not promulgate until 1994. RT 6866-67.

The trial court rejected Ford's proposed jury instructions that would have informed the jury of the relevance of these and other factors to the punitive damages calculation. Pet. App. 49a-53a; RT 9449-50. The court also denied Ford's motion *in limine* to exclude under *BMW* evidence of its wealth and out-of-state sales and profits. Clerk's Transcript ("CT") 177-86; RT 343-46.[1] As a result, plaintiffs' counsel was free to, and did, argue that the jury should inflict a punishment based on Ford's worldwide wealth and nationwide sales of the Bronco, sufficient to change the behavior of Ford and consumers throughout the Nation. For instance, plaintiffs' counsel asserted that Ford had made $160 million in

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[1] Under California law, Ford's motion *in limine* sufficed to preserve its objection. *People v. Rowland*, 4 Cal. 4th 238, 263-64 n.3 (1992); *Summers v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 1184 (1999).

profits on nationwide sales of 1978-79 Broncos, and urged jurors to award "a billion dollars in punitive damages" to make "the front page of U.S.A. Today . . . the front page of the New York Times . . . [and] the front page of the Wall Street Journal." RT 9585-88. He told jurors that "[y]ou've got to say a number that gets on the front page of every newspaper in the country" and "get[s] the world's attention." RT 9588-89.

Even though the case involved a single accident, even though the roof design was incorporated in 140,000 vehicles and had never been found to have caused any other injury in 25 years,[2] even though no person had ever petitioned NHTSA to find the design unsafe, and even though NHTSA had been regulating roof-crush performance and evaluating accident data for decades, plaintiffs' counsel urged the jury to "educate NHTSA" by returning a huge verdict against Ford. RT 9591. Counsel insisted that "[i]t isn't just government" that can "change the vehicles," and incited the California jury to "[t]ake this car out of its existence" and "stop that mother in Montana from putting her children in the back of the car." *Id.* at 9999-10000. He emphasized that this was "an important verdict for . . . the whole country." *Id.* at 9473.

The jury acted accordingly. Although it rejected plaintiffs' failure to warn claim, it returned a verdict for plaintiffs on their manufacturing and design defect claims, holding Ford 78 percent responsible for plaintiffs' injuries (and allocating 10 percent of the fault to Juan Romo, and 12 percent to the other driver). Pet. App. 3a. It awarded $6.2 million in compensatory damages, $4.6 million of which was assessed against Ford. *Id.* Then, by a vote of 9-3—the minimum nec-

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[2] Plaintiffs' counsel admitted during closing argument that "there's no evidence that there's any lawsuits with respect to 1978-79 Broncos before. . . . There's been no evidence of that." RT 9990.

essary for a verdict—the jury found Ford guilty of "malice" and imposed $290 million in punitive damages. *Id.*[3]

2. In its post-trial motions, Ford, *inter alia*, reiterated its Due Process and Commerce Clause arguments, asserted that the $290 million verdict was unconstitutionally excessive, and moved for a new trial on juror misconduct grounds. Supplemental CT 1-37; CT 3400-20.

The court, finding that prejudicial juror misconduct occurred during deliberations, granted a new trial on punitive damages. The court found that one juror, in violation of the court's admonitions, had "told other jurors of a '60 Minutes II' program which aired [during the trial] and that featured alleged fire problems from rear-end collisions involving older Ford Mustangs" as well as "graphic depictions of the burn injuries suffered" by passengers. Pet. App. 44a. The court had excluded evidence of Mustang and other rear-impact fires as irrelevant and unduly prejudicial in this non-fire, non-rear-impact case. RT 329-33, 6360-62, 6377-82.

The same juror also (inaccurately) told other jurors that Lee Iacocca, who had been Ford's president during the Bronco's development and had often been mentioned during trial, had said on the show that Ford's policy was to defend or settle lawsuits rather than recall vehicles or correct defects.[4] Pet. App. 44a. This juror "actually stated that the interview with Lee Iacocca showed Ford's malice," CT 1649, justifying punitive damages. Pet. App. 44a.

Another juror, "after repeatedly telling the jurors that they needed to 'save the babies,' . . . told the jury in great detail of a morbid nightmare she supposedly had the night before in which her child and the other jurors' children were killed by a repeatedly rolling-over Bronco while the Ford at-

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[3] In an unintentional tort case, California defines "malice" as "despicable conduct" carried on with a "willful and conscious disregard for the rights or safety of others." CAL. CIVIL CODE § 3294(c).

[4] As the trial court found, Iacocca made no such statement on the program. Pet. App. 44a.

torneys and witnesses, armed with guns, mockingly chanted, 'Where's the proof, where's the proof?'" Pet. App. 44a. This juror also repeatedly told her fellow jurors that they "did not need to follow the law because saving babies was too important." *Id.* (quotation marks omitted).

The trial court ruled that, in light of this misconduct, "[f]airness dictates a new trial on the issues of malice and punitive damages." Pet. App. 45a. The court explained: "Juror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case, and a refusal to follow the law." *Id.* The court found that "the deliberative process on [punitive damages] was presumptively infested with passion and prejudice," rendering the verdict "fundamentally suspect." *Id.*

3. The court of appeal reversed. The court rejected the trial court's conclusions regarding juror misconduct by simply "presum[ing]" that the trial court's generic instructions and the foreperson's admonitions would have cured any prejudice. Pet. App. 14a. In addition, although the court recognized that the unprecedented amount of the award was "somewhat arbitrary," *id.* at 37a, it nevertheless reinstated the entire $290 million penalty.

In applying *BMW*, the court performed what it characterized as a *de novo* review under *Cooper Industries*. In fact, however, the court simply incorporated its highly deferential "substantial evidence" review under state law, assuming that the jury resolved every contested factual issue against Ford. Pet. App. 20a. The court also disregarded Ford's undisputed compliance with federal safety standards and industry custom. Even though it could not point to any evidence that any individual Ford employee had acted with malice or believed that the company was "compromis[ing] consumer safety" when designing the Bronco, *id.* at 32a, the court deemed

Ford's conduct "grossly reprehensible" and "despicable" because it resulted in personal injury. *Id.* at 30a, 38a.[5]

Although conceding that the "great disparity between the compensatory and punitive damages award" supported an excessiveness finding, the court deemed that great disparity to be immaterial "because wrongful death compensatory damages do not fully reflect the harm to the victims." *Id.* at 39a. Similarly, the court held *BMW*'s "comparable penalties" guidepost wholly "inapplicable" because the "malicious conduct could have resulted in substantial imprisonment if committed by an individual rather than a corporation." Pet. App. 39a.

The court also rejected Ford's argument that *BMW* precluded punishing Ford based on *nationwide* sales of the Bronco, and punished Ford based on its "over $100 million" in profits from such sales. Pet. App. at 36a. The court claimed this was justified because "the interest California seeks to protect—individual human lives—is neither unique to California nor limited to its own citizens." *Id.* at 38a-39a & n.3.

Citing Ford's financial status at the time of trial in 1999, the court held that Ford "has been on notice 'for more than a century' that California regards it as necessary to impose penalties related to the wealth of the defendant," and thus upheld the $290 million award because Ford "is a huge company with enormous monetary resources." *Id.* at 36a, 40a.

REASONS FOR GRANTING THE WRIT

In *BMW*, this Court held that the Due Process Clause forbids "grossly excessive" punitive damage awards, and that claims of excessiveness are to be evaluated by reference to three "guideposts"—reprehensibility, ratio, and comparable penalties—to determine whether the defendant had "fair notice" of the severity of the punishment that could be imposed.

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[5] The court even went so far as to deem Ford's safety *improvement* to the 1980 Bronco's roof design further proof of Ford's *reprehensibility* as to the 1978 model. Pet. App. 35a.

517 U.S. at 574-85. Notwithstanding that clear directive, the court below held that the three *BMW* guideposts are either inapplicable or essentially meaningless in product liability cases. With respect to the reprehensibility prong, for example, the court held that mere awareness that a product poses a potential risk of personal injury (no matter how small) suffices to establish gross reprehensibility, notwithstanding the defendant's compliance with government and industry standards and its good faith belief that the risk was not unreasonable. As shown below, that holding is irreconcilable with *BMW*, and contradicts longstanding punitive damage doctrine applied by state and federal courts around the country.

The court of appeal created a further conflict by holding that the ratio prong has reduced significance in wrongful death cases, and that a punitive damage award that is 63 times the very substantial compensatory award suffers from no constitutional infirmity. In addition, the court of appeal squarely held that the comparable penalties prong is "inapplicable" whenever the underlying conduct could result in imprisonment if committed by an individual—a holding that is directly at odds with numerous decisions of other courts, including the Ninth Circuit, the regional circuit whose jurisdiction includes California. Further compounding its errors and the conflict among lower courts, the court below concluded that the constitutional requirement of "fair notice" was satisfied by Ford's wealth, which purportedly sufficed to put Ford on notice that it could be subjected to a massive punitive damage award at the whim of a California jury based on conduct that occurred a quarter-century ago. Moreover, the court's holding that a single jury could deprive Ford of its total nationwide profits from the 1978 Bronco conflicts with *White v. Ford Motor Co.*, in which the Ninth Circuit rejected such an approach as unconstitutional.

In reinstating the punishment, the court denied Ford any meaningful appellate review. Applying California's exceedingly deferential "substantial evidence" standard, the court characterized its skewed depiction of the "facts" hypothetically found by the jury as the *de novo* review mandated by

Cooper Industries, and then deferred to the arbitrary punishment that the jury picked from thin air.

The court of appeal's ruling defies the constitutional limitations on punitive damages that this Court has repeatedly recognized, and creates or compounds numerous splits among the lower courts concerning the applicability of *BMW* and *Cooper Industries* in the context of product liability cases. There are obvious and straightforward solutions to these problems and conflicts, but only this Court can provide them. Plenary review is warranted. Alternatively, the Court should hold this case pending its decision in *State Farm*.

I. REVIEW IS WARRANTED TO PREVENT NULLIFICATION OF *BMW* IN PRODUCT LIABILITY CASES

The court of appeal interpreted *BMW* in a way that eviscerates all three due process guideposts in product liability cases involving large corporate defendants. Its reasoning typifies the approach followed by many lower courts, conflicts with *BMW* itself and other decisions, and underscores the urgent need for guidance from this Court.

A. The Court Of Appeal's *Per Se* "Gross Reprehensibility" Rule Contradicts *BMW* And Other Decisions

1. This Court's prior decisions analyzing punitive damages for excessiveness have involved *intentional* torts such as fraud and unfair competition; this case, by contrast, alleges a negligently designed vehicle roof. As Justice Kennedy recognized in *TXO Production Corp. v. Alliance Resources Corp.*, punitive damages that would be appropriate in the context of an intentional tort may not be appropriate in "a case of negligence [or] strict liability." 509 U.S. 443, 468 (1993) (Kennedy, J., concurring).

The court of appeal acknowledged that Ford "did not intend" to cause harm, and even applying the deferential "substantial evidence" test, the court could not point to any evidence that any individual Ford employee had acted with

"malice." Pet. App. 32a, 38a. Instead, the court held that the jury was entitled to "infer" malice "by piecing together knowledge and acts" of various unidentified Ford personnel stretching back for decades. *Id.* at 25a. The court recognized that there was no evidence that the Bronco's roof design had ever previously been deemed defective; indeed, plaintiffs' counsel had admitted that, despite a quarter-century's use of over 140,000 of these vehicles, there was no evidence of other lawsuits even *alleging* this design defect. And the evidence is uncontroverted that the design both comported with industry custom and surpassed the federal standards that existed at the time of the design—and that exist today.

The court of appeal, however, rejected these facts as irrelevant to reprehensibility. The court instead invoked the fact that the plaintiffs alleged personal rather than economic injury as a basis for evading *BMW*, Pet. App. 38a ("the award here cannot be compared to cases involving a business fraud resulting only in economic harm") (citation omitted), and it deemed Ford's conduct grossly reprehensible and "despicable" because, for purposes of making a profit, Ford marketed a product that "*could* kill people." *Id.* at 25a-26a (emphasis added); *id.* at 38a (Ford's conduct "involved mass production and marketing" of a product "purely for defendant's economic betterment").

Other courts, like the court of appeal here, have adopted a rule that design defects *per se* reflect serious reprehensibility under *BMW* because the manufacturers "knew" that their products were *capable* of causing serious injury. *See, e.g.*, *Smith v. Ford Motor Co.*, 83 S.W.3d 483, 494 (Ky. 2002) (finding "substantial" reprehensibility where NHTSA had declined to find 1977 design defective and design complied with industry standards, but personal injury resulted many years after design); *Clark v. Chrysler Corp.*, 310 F.3d 461, 482 (6th Cir. 2002) (finding negligent design that comported with federal safety standards reprehensible because it "resulted in the loss of life"); *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 840 (Or. Ct. App. 2002) (reprehensible to market product "that *could* cause serious illness or death") (emphasis

added); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 46 (Tex. 1998) ("[c]onduct that *endangers* a person's health or safety merits more punishment than purely economic harm") (emphasis added); *cf. Wightman v. Consolidated Rail Corp.*, 715 N.E.2d 546, 554 (Ohio 1999) ("this case distinguishes itself . . . from *BMW*" because it involves "massive property damage" and "physical injuries").

Thus, while this Court in *BMW* stated that "reprehensibility" is "[p]erhaps the most important indicium" of excessiveness, 517 U.S. at 575, these lower courts have rendered that factor meaningless in product liability cases. These courts have misconstrued a passage in *BMW* observing that the harm in that case was "purely economic in nature" and that the defendant "evinced no indifference to or reckless disregard for the health and safety of others" (*id.* at 576) to mean that, where conduct results in personal injury, *BMW* does not require meaningful, objective judicial review of reprehensibility. But this approach "make[s] 'reprehensibility' a concept without constraining force, *i.e.*, [it] deprive[s] the concept of its constraining power to protect against serious and capricious deprivations." *BMW*, 517 U.S. at 590 (Breyer, J., concurring) (discussing Alabama standard).

2. The court of appeal's refusal to consider Ford's reasonable, good faith belief that its conduct was lawful, based (among other things) on its compliance with federal safety standards and industry custom, squarely conflicts with *BMW*. In *BMW*, for example, the jury found that defendant's policy with respect to the disclosure of factory repairs constituted "'gross, oppressive, or malicious' fraud" even though that policy was consistent with statutes defining disclosure obligations in about 25 States. 517 U.S. at 565. Alabama had no such disclosure statute, and this Court "accept[ed] . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate." 517 U.S. at 579-80. Nevertheless, this Court recognized that BMW, in attempting to determine what it was required to disclose, "could reasonably rely on [other] state . . . statutes for guidance." *Id.* at 579. The Court also noted that the "diversity"

of state laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement." *Id.* at 570. The Court concluded that a failure to disclose is "less reprehensible . . . when there is a good faith basis for believing that no duty to disclose exists," *id.* at 579-80, and when "a corporate executive could reasonably interpret" the law to allow nondisclosure. *Id.* at 578.

This same analysis is equally applicable in product liability cases like this one. Even if *some* amount of punitive damages can be imposed because plaintiffs' paid experts disagree with Ford—and with Ford's experts, the federal government, and the entire motor vehicle industry concerning roof design—the existence of grounds for reasonable people to disagree on this issue, and of strong objective indicators that Ford's conduct was both lawful and reasonable, surely is relevant to the reprehensibility analysis, just as the state disclosure statutes were relevant to that issue in *BMW*. The court of appeal, however, rejected any such inquiry here, declaring that "it avails [Ford] nothing that other auto manufacturers also used fiberglass roofs on contemporaneous fiberglass utility vehicles" and dismissing the fact that the 1978 Bronco surpassed 1994 federal roof strength standards by 30 percent as "merely coincidental." Pet. App. 29a, 35a-36a.

The decision below also conflicts with the traditional approach taken by most state and federal courts. Most courts recognize that where there is ground for reasonable disagreement about legal obligations, punitive damages are prohibited. *See, e.g.*, *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating award in defective design case where "there is a genuine dispute in the scientific community as to" the reasonableness of the design); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (punitive damages inappropriate where "reasonable disagreement" exists over risks and utilities of product); *Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 234 (Miss. 2001) (punitive damages barred where insurer "had an arguable or legitimate basis for denying the claim"). In fact, this proposition is so basic to the law of punitive damages that the Fifth Circuit has held

that it is "plain error"—*i.e.*, "an error so fundamental as to result in a miscarriage of justice"—to permit a jury to award punitive damages where the evidence "demonstrated a good faith dispute" as to whether the defendant's conduct was lawful. *Barber v. Nabors Drilling USA, Inc.*, 130 F.3d 702, 710 (5th Cir. 1997).[6]

Accordingly, some courts not only deem compliance with government safety standards relevant, but hold that it is so plainly inconsistent with a finding of malice or conscious wrongdoing that it bars the imposition of punitive damages altogether. *See, e.g., Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994) (punitive damages prohibited where defendant complied with federal safety standards); *Satcher*, 52 F.3d 1311 (punitive damage award barred where no government agency had ever required certain design feature); W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984) ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages.").

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[6] A state law that permits a defendant to be punished *at all* where the defendant had reasonable grounds to believe its conduct was lawful raises serious due process concerns. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) ($6,300 civil penalty violated due process where defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief" and *even assuming* that defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable"). If manufacturers can be punished for selling products that reasonable people could conclude are not defective, the only way they can modify their conduct to avoid punishment is to stop selling all products that might be subject to criticism by a plaintiff's expert. Such a law would violate due process because it would be unconstitutionally vague. *See, e.g., United States v. Powell*, 423 U.S. 87, 93 (1975) (explaining why prohibition against charging an "unreasonable" price for sugar was unconstitutionally vague: "Engaged in a lawful business which Congress had in no way sought to proscribe, [the defendant] could not have charged any price with the confidence that it would not later be found unreasonable.") (emphasis omitted).

Likewise, many courts hold that "[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind." *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993); *see also Satcher*, 52 F.3d at 1316-17 (vacating punitive damage award where defendant's design was consistent with that of other manufacturers); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (punitive damages inappropriate where defendant's conduct was consistent with industry practice).

The decision below thus conflicts with both *BMW* and the approach followed in all of these cases, and effectively erases the reprehensibility factor from the constitutional calculus in product liability cases.[7]

3. Review by this Court is imperative if manufacturers are not to be subject to huge punitive damage awards every time a jury, in hindsight, finds a product to be defective. To say, as the court did here, that a manufacturer, to make a profit, marketed a product that "could kill people," simply begs the question as to reprehensibility. That is because *all* manufacturers sell products to make a profit, *all* products can and do cause injury, and *all* design decisions reflect a balance of risks, costs and utility. *See, e.g., Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991) ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*"); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998).

Many products, like automobiles, by their very nature pose risks of serious injury and death that cannot be materially reduced without significant cost to society in the form of increased prices, less convenience or utility, or even less

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[7] The court's misunderstanding of reprehensibility in the product liability context is further demonstrated by its erroneous reliance on Ford's subsequent design improvement as an aggravating, rather than mitigating, factor (Pet. App. 35a) and by its finding of gross reprehensibility absent any evidence that any individual Ford employee even acted maliciously (*id.* at 32a).

safety in other circumstances. *See generally* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 550 (2000). The decision as to which design strikes the proper balance among competing interests is often complex and rests upon a "morass of conceptual, political and practical issues on which juries, courts, commentators and legislatures strongly disagree." David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U. CHI. L. REV. 1, 37 (1982).

Compounding the problem, jurors are confronted with deciding whether a product creates "too much risk" in the context of individual cases involving tragic personal injuries, using hindsight, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 59 (1992); *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring).[8] The result is that product liability cases like this one, and like *Smith*, pose great danger that juries will "use their verdicts to express biases against big businesses," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431-32 (1994), even more so than in cases involving intentional economic torts, such as the fraud claim in *BMW*.

Consequently, guidance from this Court on the "reprehensibility" analysis in product liability cases is especially necessary, because such cases pose the greatest risk that the jury will be overcome by sympathy, bias, passion and prejudice and, as one of the jurors here urged, disregard the law "because saving babies [is] too important." Pet. App. 44a.

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[8] *See also* Viscusi, 52 STAN. L. REV. at 586-90 (noting that jurors often demonstrate bias against companies that engage in risk-safety balancing); Reid Hastie et al., *Looking Backward in Punitive Judgments: 20-20 Vision?*, in Cass R. Sunstein et al., PUNITIVE DAMAGES: HOW JURIES DECIDE 96, 108 (2002) (concluding that "hindsight bias is almost inevitable when jurors make punitive damages decisions").

B. The Court Of Appeal's Disregard For The Ratio Guidepost Contradicts *BMW* And Other Decisions

The court of appeal similarly eviscerated the second *BMW* guidepost—the ratio of punitive to compensatory damages—on the ground that this case involves personal injury. The court acknowledged the "great disparity between the compensatory and punitive damages award," and conceded that "this factor weighs in favor of a finding of excessiveness," but asserted that ordinary ratio analysis simply did not apply because "wrongful death compensatory damages do not fully reflect the harm to the victims." Pet. App. 39a.

The 63:1 ratio is unconstitutional on its face. This Court held in *BMW* that "exemplary damages must bear a 'reasonable relationship' to compensatory damages." 517 U.S. at 580. Although this Court has eschewed "'a simple mathematical formula'" governing excessiveness, it has recognized that historical penalties typically "provided for double, treble, or quadruple damages" and that a 4:1 ratio is "close to the line," 517 U.S. at 581-82 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)). Numerous courts of appeals have followed this Court's reasoning in rejecting similar ratios. *See, e.g.*, *FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997) (holding that punitive damages generally cannot exceed a 10:1 ratio, and noting that ratios in excess of 4:1 will rarely be upheld); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-44 (5th Cir. 1996) (holding a 6.5:1 ratio excessive).

In fact, in product liability cases, where juries frequently award high compensatory damages that far outstrip any "gain" from the alleged misconduct, *see infra* pp. 22-23, and where the harm caused by the defective design is readily apparent and thus unlikely to escape detection, even a 1:1 ratio will often be grossly excessive because the compensatory award itself is sufficient to deter the misconduct. *See, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("Deterrence . . . operates through the mechanism of

damages that are compensatory.") (emphasis omitted); *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").

This Court recognized no "wrongful death" exception to the ratio guidepost in *BMW*, and there is no basis for such an approach. In *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 179 (Mo. Ct. App. 1998), for example, the court held that a 27:1 ratio was unconstitutionally excessive in a design defect/wrongful death case when compensatory damages were "large, up to $2.5 million." Here too, plaintiffs received a large $4.6 million compensatory award, and *BMW*'s ratio analysis is fully applicable.

This Court recognized in *BMW* that "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." 517 U.S. at 580. The court of appeal's approach effectively nullifies in wrongful death cases a long-recognized, objective and readily ascertainable indicator of excessiveness. This Court's review is warranted.

C. The Court Of Appeal's Holding That The Comparable Penalties Guidepost Is "Inapplicable" Contradicts *BMW* And Other Decisions

The court of appeal improperly rejected the comparable penalties guidepost by focusing, once again, on the presence of personal injuries. The court likened Ford's design of the Bronco roof to "involuntary manslaughter," which in California carries a maximum fine of $10,000 against a corporation, but pronounced the comparable penalties guidepost "inapplicable" because such a comparison "is inappropriate when the malicious conduct could result in substantial imprisonment if committed by an individual instead of a corporation." Pet. App. 39a. By declaring this guidepost simply "inapplicable," the court eliminated from consideration both the most analogous penalty under state law and a directly applicable federal *civil penalty* that could have been imposed

for a design defect. Both at the time of the conduct at issue and at the time of trial, that civil penalty was $1,000 per vehicle, up to a maximum of $800,000 for a defective fleet of vehicles. *See* 49 U.S.C. § 30165(a).

The court's reasoning cannot be reconciled with *BMW*. In *BMW* itself, the conduct in question—repainting new vehicles without telling consumers—was alleged to have constituted fraud, an offense for which an individual could be sentenced to jail. Given that *most* torts that furnish a predicate for punitive damages—*e.g.*, fraud, battery, wrongful death—could also theoretically subject an individual tortfeasor to imprisonment, the court of appeal's holding would render the "comparable penalties" guidepost a nullity in the vast majority of punitive damage cases. Moreover, legislatures know full well that corporations cannot be imprisoned when they establish the maximum fines governing corporate conduct. *See Granite Constr. Co. v. Superior Court*, 149 Cal. App. 3d 465 (1983) (discussing California's involuntary manslaughter statute).

Other courts have nonetheless taken the same approach as the court below. For example, in *Bielicki v. Terminix International Co.*, the Tenth Circuit held that although a "punitive damages award [may be] exceptional when compared only to the applicable fines, the authorization of imprisonment in the criminal context can justify a higher award." 225 F.3d 1159, 1166 (10th Cir. 2000); *see also Mosing v. Domas*, 830 So. 2d 967, 982 (La. 2002) ("While the possible criminal monetary penalty is significantly less than the exemplary damage award in this case, the fact that the offense carries a term of imprisonment makes the difference in monetary penalties less relevant."); *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2001 WL 1246676, at *17 (Utah Oct. 19, 2001) ("Possible imprisonment for [the challenged] conduct is a strong indication that [it] warrants high punitive damages."), *cert. granted*, 70 U.S.L.W. 3580 (U.S. June 3, 2002) (No. 01-1289); *In re Exxon Valdez*, No. A89-0095-CV, 2002 WL 31761256, at *18 (D. Alaska Dec. 9, 2002).

These decisions squarely conflict with rulings from the many courts that *have* looked to comparable fines even when the challenged conduct could have resulted in imprisonment. For example, the Ninth Circuit has held that, under *BMW*, "[c]riminal fines are particularly informative because punitive damages are quasi-criminal." *In re Exxon Valdez*, 270 F.3d 1215, 1245 (9th Cir. 2001); *see also Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248-49 & n.23 (9th Cir. 1998) ($16.5 million punitive damage award is excessive where it "far exceeds" Alaska's general criminal fine for "scheming to defraud"); *Lee v. Edwards*, 101 F.3d 805, 811-12 (2d Cir. 1996) (considering general criminal fine for "making of a false statement"). *Cf. United States v. Bajakajian*, 524 U.S. 321, 334-35 (1998) (applying "comparable penalty" analysis under Excessive Fines Clause where conduct gave rise to imprisonment). The need for review is particularly compelling here, given the conflicts between the state and federal appellate courts in California.[9]

D. The Court Of Appeal's Use Of Ford's Overall "Wealth" To Trump The *BMW* Guideposts Contradicts *BMW* And Other Decisions

1. The relevance, if any, of a defendant's wealth under *BMW* is a question that has confused and divided the lower

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[9] The court of appeal also rejected the relevance of prior awards affirmed in California when the conduct occurred, once again contradicting the holdings of other courts. *See, e.g., Davis v. Rennie*, 264 F.3d 86, 117 (1st Cir. 2001), *cert. denied*, 122 S. Ct. 1909 (2002); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 577 (8th Cir. 1997); *Patterson*, 90 F.3d at 943. The $290 million punitive damage verdict here is *1,000 times* larger than any other award in a product liability case ever affirmed in California (and U.S.) history at the time of the Bronco's design in the mid-1970s. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000.") (citing David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1329-32 (1976)).

courts and warrants this Court's review. In *BMW*, this Court rejected the claim that a defendant's wealth could justify a heightened penalty: "The fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, [a corporation's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." 517 U.S. at 585.

The court of appeal, however, ultimately upheld the award in this case not on the basis of any of the *BMW* guideposts but by reference to Ford's overall wealth. The court justified its disregard of the *BMW* guideposts by holding that Ford's purported wealth provided "adequate notice of the potential for the punitive damages awarded in this case." Pet. App. 40a. According to the court, Ford "is a huge company with enormous monetary resources" and it should have known that "California regards it as necessary to impose penalties related to the wealth of the defendant in order to achieve the goals of punishment and deterrence." *Id.* at 36a, 40a. Numerous other courts follow this approach.[10]

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[10] *See, e.g.*, *State Farm*, 2001 WL 1246676, at *8 (reinstating punitive award in part because "State Farm's wealth is enormous" and "the jury's punitive damage award of $145 million is only 0.26 of one percent of State Farm's wealth"); *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 841 (Or. Ct. App. 2002) (holding that "the defendant's wealth is an important consideration" in determining excessiveness, and reinstating a $79.5 million punitive damage award on the ground that the award "is equal to a little more than two and a half weeks' profit"); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338-39 (11th Cir. 1999) (upholding award under *BMW* and noting that "[defendant] is a large and extremely wealthy international corporation"); *Ammerman v. Ford Motor Co.*, 705 N.E.2d 539, 563 (Ind. Ct. App. 1999) ("Ford knew or should have known" of the potential for a $13.8 million punitive damage award "given that Ford's economic wealth . . . is a factor to be considered in assessing punitive damages"); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996) (upholding punitive damage award against a *BMW* challenge on the basis of

The court of appeal's holding that Ford "has been on notice since at least 1971 that a week's profits amounting to about 1 percent of net wealth are not excessive punitive damages," Pet. App. 40a, directly conflicts with *Continental Trend Resources, Inc. v. OXY USA, Inc.*, in which the Tenth Circuit concluded that "a large punitive damage award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits." 101 F.3d 634, 641 (10th Cir. 1996). Many courts have similarly held that a corporate defendant's wealth cannot trump the *BMW* standards. *See, e.g., Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1152 (9th Cir. 2002) (on remand) (holding that "in view of the [*BMW*] factors, we cannot conclude that this consideration [of defendant's wealth] renders the amount awarded by the jury constitutional"); *Bowden v. Caldor, Inc.*, 710 A.2d 267, 279 (Md. 1998) ("merely because a defendant may be able to pay a very large award of punitive damages . . . does not justify an award which is disproportionate to the heinousness of the defendant's conduct"); *see also Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995) (retired Justice White, sitting by designation) ("a defendant's wealth cannot alone justify a large punitive damage award").

This Court should grant certiorari and reject this approach as nothing less than an end-run around *BMW*. The court of appeal's ruling demolishes the concept of due process by automatically deeming large corporations to have had "fair notice" of virtually *any* monetary punishment that a jury conceivably could impose. The implicit premise—that if you have money, you are deemed to be on notice that a jury could impose a huge punishment on you—leaves wealthy defendants bereft of meaningful constitutional protection. Even accepting the court of appeal's faulty premise that wealth is a

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[Footnote continued from previous page]

the defendant's "net sales" and "net worth," and asserting that "[o]ne of the factors approved by the Supreme Court . . . for assessing the imposition of punitive damages is the financial position of the defendant").

proxy for notice, it is plainly incorrect to say that Ford was on notice in the 1970s of what its net worth would be at the turn of the century, and thus had fair notice of the penalty that could be imposed retroactively over two decades later.

2. In analyzing the excessiveness of a punitive damage award against a corporation, the relevant financial information, if any, is the monetary "gain," within the State, attributable to the defendant's wrongful conduct. Scholars uniformly recognize that this figure, unlike overall wealth, is rationally related to the societal objective of deterrence where the defendant is a corporation. *See, e.g.*, 2 American Law Institute, *Enterprise Responsibility for Personal Injury: Reporter's Study* 254-55 (1991) ("In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's overall wealth, but rather profit it realized from the particular tortious activity in question."). Indeed, common sense suggests that a profit-motivated entity is not likely to engage in conduct it knows will not be profitable. And as long as any one State does not attempt to deprive the defendant of gain attributable to conduct in other States, there are no extraterritoriality concerns.[11]

In *Cooper Industries*, the Court expressly recognized that a punitive damages award must be tethered to the profits generated by the misconduct at issue, not the defendant's entire profits on the sale of a product. In that case, the wrongful conduct was using a photograph of a competitor's product to market the defendant's similar product. The district court, in affirming a $4.5 million punitive award, might have relied upon the plaintiffs' calculation that the defendant anticipated "gross profits of approximately $3 million" from its sale of its product in the first five years. 532 U.S. at 442. But, as this Court recognized, that was not the proper analysis, because "it would be unrealistic to assume that all of [the defendant's] sales . . . would have been attributable to its mis-

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[11] Due process might, however, prohibit a State from permitting multiple plaintiffs within the State to each recover all of the defendant's statewide gain from the wrongful conduct.

conduct." *Id.* In other words, the defendant's "wrongdoing surely could not be treated as the principal cause of [the defendant's] entire sales volume for a 5-year period." *Id.*

Here, the court of appeal relied on Ford's *total* profits on sales of 1978-1979 Broncos, and reinstated a fine that deprives Ford of *nearly triple* that amount. Pet. App. 36a. But there is no evidence that Ford's allegedly defective roof design was the principal cause of its entire sales volume of the 1978 and 1979 Broncos. Instead, the record reflects that Ford's total "gain" from choosing the design it did over the alternative preferred (in hindsight) by plaintiffs' experts amounts to less than $1.8 million nationwide, and far less in California. *See* Exh. 133.10 (Ford sold 72,700 1978 Broncos and 75,800 1979 Broncos); RT 9532 (cost of design change plaintiffs advocated is $10 to $12 per unit). The court of appeal's decision, by relying on Ford's overall wealth and profits, contradicts *Cooper Industries* and merits review.

II. REVIEW IS WARRANTED TO CLARIFY THE CONSTITUTIONAL LIMITS ON ONE STATE'S POWER TO PUNISH BASED ON OUT-OF-STATE SALES AND PROFITS

As shown above, the court of appeal's reliance on Ford's *overall* profits is contrary to *Cooper Industries*. The court's reliance on Ford's *nationwide* profits defies the federalism, due process and Commerce Clause limits recognized in *BMW* and directly conflicts with the Ninth Circuit's recent decision in *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002).

In *BMW*, this Court explained that "each State has ample power to protect its own consumers, [and] none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." 517 U.S. at 585. To safeguard other States' autonomy, a punishment therefore "must be analyzed in the light of [in-state conduct], with consideration given only to the interests of [the State's] consumers, rather than those of the entire Nation." *Id.* at 574.

The court of appeal held that it could impose extraterritorial punishment because it concluded that, "[u]nlike [the conduct in] *BMW*," Ford's conduct was "unlawful in all states." Pet. App. 38a-39a & n.3. But it is wrong to assume that product liability and punitive damage laws are uniform. These laws vary dramatically. *Cf. White*, 312 F.3d at 1017-19 (noting differences in failure-to-warn and punitive damage laws). Accordingly, the court lacked any basis for concluding that the Bronco's roof design would be deemed defective and punishable in any other State, and in fact that design has never before been found defective since its introduction nearly a quarter-century ago.

The decision below directly conflicts with the Ninth Circuit's recent ruling in *White*, creating a split between California's state and federal courts, and worsening an existing conflict throughout the country. Some courts, like the court below, have rejected the argument that *BMW* limits their ability to impose punitive damages based on a defendant's out-of-state conduct or profits. For example, in *Smith v. Ingersoll-Rand Co.*, the Tenth Circuit approved such punishment because "the manufacture of defective products is not a lawful activity in any of the jurisdictions where the other incidents occurred." 214 F.3d 1235, 1253 (10th Cir. 2000); *Owens-Corning Fiberglas Corp. v. Ballard*, 739 So. 2d 603, 606 (Fla. Dist. Ct. App. 1998) ("where the defendant's conduct is considered tortious in all 50 states . . . the same due process concerns implicated in *BMW* do not arise").

The Ninth Circuit rejected this approach in *White*, where the plaintiffs' counsel made arguments identical to those advanced by plaintiffs' counsel here. In *White*, the plaintiffs alleged a design defect in a different Ford vehicle and urged the Nevada jury to award punitive damages "that would punish Ford for its conduct toward consumers in all states." 312 F.3d at 1015. Just as in this case, "[t]he evidence focused on the number of vehicles Ford sold nationally." *Id.* Indeed, "[t]he entire thrust of [the plaintiffs'] argument was that this Nevada jury now should vindicate the interests of all Ford truck owners everywhere with a verdict that would make the

front page of every newspaper in the country" (*id*).—precisely the same argument plaintiffs' counsel made here. *See* RT 9589 ("You've got to say a number that gets on the front page of every newspaper in the country.").[12]

The Ninth Circuit, however, reversed the punitive damage award in *White*, holding that under *BMW*, "we may not, as a matter of federal law, permit one state to punish . . . nationwide manufacturers for their conduct—actual or hypothetical—in other states." 312 F.3d at 1014 n.62. The court recognized that "*BMW* imposed a territorial limitation on punitive damages in the interest of federalism," and stated that allowing the jury "to measure damages by [the alleged] harm to the whole country" was a "substantive error . . . of federal constitutional law." *Id.* at 1013, 1015-16 & n.69. *See also Sheldon v. Vermonty*, No. 98-2277, 2002 WL 31498908, at *8 (D. Kan. Nov. 8, 2002) (out-of-state injuries irrelevant to excessiveness analysis because "there was no testimony that the people were either from Kansas or harmed in Kansas").

Permitting one State to impose punishment based on profits from sales in other States subjects the defendant to multiple and duplicative penalties on the basis of the same challenged design feature, thus negating all prior and subsequent exonerations. Moreover, this approach invites lay juries to act as national safety regulators. Here, plaintiffs' counsel explicitly urged the jury to "educate NHTSA," overrule the conclusions of the government's experts, and use its punitive damage verdict to force Ford to "[t]ake this car out

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12 *See also* RT 9588 (urging verdict that would generate headlines on "the front page of U.S.A. Today . . . the front page of the New York Times . . . the front page of the Wall Street Journal. We've got somebody's attention. We've got them talking about it in the boardrooms."); RT 9588 ("Billion dollars, why? . . . Number one, we get Ford's attention, get the world's attention and we get those people's attention who are still driving that car. There's 50 to 70 to 80,000 1978-79 Broncos in people's garages with kids right now. . . . Someplace somewhere some mother is taking their kid and strapping them in the back of a 1978 Bronco today.").

of its existence .... [and] stop that mother in Montana from putting her children in the back of that car." RT 9591, 9999.

The *Smith* case also vividly illustrates the problem. In *Smith*, the Kentucky courts actually permitted a Kentucky jury to punish Ford for the sale of vehicles in other States in which juries had rejected the very same claim of defect. Ford's *Smith* Pet. at 17. This case is different from *Smith* only because Ford has had fewer opportunities to litigate the issue, and therefore fewer opportunities for defense verdicts. As plaintiffs' counsel conceded in closing argument, there was no evidence that Ford, in the quarter-century since the 1978 Bronco was introduced, had ever been sued for alleged defects in the 1978 Bronco's roof.

This Court's review is necessary to make clear that the territorial limits on punitive damage awards prevent one jury in a single State from effectively regulating vehicle design on a national scale and displacing and disrupting federal safety regulation and the policies of other States.

III. REVIEW IS WARRANTED TO DETERMINE HOW *COOPER INDUSTRIES*' *DE NOVO* STANDARD APPLIES TO REVIEW OF A JURY'S VERDICT

In *Cooper Industries*, this Court held that appellate courts must review a trial court's ruling on a *BMW* excessiveness challenge under a *de novo* standard. 532 U.S. at 431. The Court also indicated that a reviewing court must generally respect the jury's "specific findings of fact," *id.* at 440 n.12, but it did not elaborate on this point. Although this Court's decisions in *BMW*, *Cooper Industries* and other cases implicitly reject the highly deferential approach followed by the court here, the meaning and application of *de novo* review has divided the lower courts and warrants review.

1. The decision below implicates a direct conflict among the lower courts. The court first reviewed the award under California law "in the light most favorable to the verdicts." Pet. App. 35a. While recognizing that the jury's award was

"somewhat arbitrary" and a "huge windfall," the court emphasized that (for purposes of review under California law) the amount was "'in the discretion of the jury'" and it reinstated the $290 million verdict without considering whether any lesser amount would be sufficient to vindicate California's interests. *Id.* at 33a, 36a-37a. The court then incorporated this same standard in rejecting Ford's *BMW* challenge, stating that "*[a]s we have already discussed*, defendant's conduct was grossly reprehensible." Pet. App. 38a (emphasis added). As a result, the court reviewed "the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor," Pet. App. 20a-21a (citation omitted), and thus deferring to presumed factual "findings" *that the jury never made and was not required to make.*[13]

Other courts follow the same approach. *See, e.g., Central Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 285 (Alaska 2002) (applying *Cooper Industries* and concluding, "as discussed above [in the state-law discussion], the appellants' [actions] reasonably constituted egregious misconduct."); *Williams*, 48 P.3d at 835 (applying *Cooper Industries* and reinstating $79.5 million punitive damages award on basis of what "[t]he jury could find from the evidence").

But other courts have rejected this approach. For example, the New Mexico Supreme Court has expressly recognized—in sharp conflict with the court of appeal in this case—that the *de novo* review required by *Cooper Industries* is different than the substantial evidence standard typically employed by state courts. Under the state-law standard, "evidence is viewed in the light most favorable to the prevail-

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[13] For example, the court declared that Ford's "malice" was demonstrated by "the total absence of preproduction testing" of the Bronco. Pet. App. 29a. Not only was this "fact" never found by the jury—which rendered findings only as to the ultimate questions of defect and malice—but it directly contradicts the record, which establishes that Ford ran its entire "standard menu" of tests for light trucks and utility vehicles "prior to production." RT 6099, 6110.

ing party and all inferences arising from the factual findings of a trial court are indulged in." *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 668 (N.M. 2002). In contrast, the *Aken* court held, under the *de novo* review required by *Cooper Industries*, "we are to make an independent assessment of the record," and "[a]nytime the record clearly shows that the jury should not have concluded as it did, the appellate court may, exercising its de novo power, set aside the award." *Id.* at 668, 669; *see also, e.g.*, *Exxon Valdez*, 270 F.3d at 1239 ("a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards"); *Leatherman Tool Group, Inc.*, 285 F.3d at 1150 (declining to "speculate" as to jury's unstated motivations and reviewing reprehensibility independently). *Cf. Honda*, 512 U.S. at 429 (review limited to a "no substantial evidence" test "provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts"). Review by this Court is warranted to resolve this conflict and confusion.

2. Review also is warranted because the decision below contradicts *BMW*, *Cooper Industries*, and this Court's decisions in analogous areas applying *de novo* review. When this Court reviewed the punitive damage award in *BMW*, it did not, for example, simply assume (consistent with the large punitive verdict) that the jury had found that BMW had no reasonable basis for believing that its disclosures were adequate; on the contrary, this Court reached its own independent conclusion on this issue, holding that state disclosure statutes outside of Alabama gave BMW reasonable grounds for believing that it had met its disclosure obligations in Alabama. 517 U.S. at 579-80. Thus, the Court deferred only to findings of fact that the jury *must* have made (*i.e.*, that BMW suppressed a material fact), while making its own independent determination on a critical, fact-dependent issue on which the jury did not necessarily make any finding at all (whether BMW had reasonable grounds to conclude its conduct was lawful). In *Cooper Industries*, when the Court stated that a

reviewing court should respect "specific findings of fact" made by the jury, 532 U.S. at 440 n.12, it specifically cited these precise pages of *BMW*. 517 U.S. at 579-80.

The Court followed the same basic approach to independent appellate review in considering a First Amendment challenge to a state libel verdict in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). The Court held that *de novo* review means that, "[i]n determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full" and "examine for [itself] the statements in issue and the circumstances under which they were made." 491 U.S. at 688 (citation omitted). For purposes of the constitutional determination, the Court took into account not the facts the jury "*may* have" found, but only those facts the jury "*must* have" found, "alongside the undisputed evidence." *Id.* at 690-91.

3. Such review is especially crucial to protect against "lawless, biased, or arbitrary verdict[s]," *Honda*, 512 U.S. at 433, in a system that, like California's, provides no meaningful guidance to juries in calculating punitive damages. "Jury instructions typically leave the jury with wide discretion in choosing amounts." *Id.* at 432. In most States, like California, jurors are told "little more than . . . to do what they think is best" and are "left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).[14] Without

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14 *See* CAL. CIV. CODE § 3294; 2 California Book of Approved Jury Instructions, § 14.71, at 247 (9th ed. 2002) (requiring that jury simply be instructed to consider reprehensibility, amount of actual damages, and defendant's financial condition, and that there are "no fixed standards as to the amount . . . of punitive damages"). Thus, in California, as one court has explained, "[t]he channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. . . . And, we have concluded, that is properly so." *Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 388 (1984).

clear and objective standards restricting the jury's discretion, and in the absence of specific findings of fact, it is rank speculation to assume that the jury premised its fine on certain findings. Here, Ford requested detailed instructions on the amount of punitive damages, but they were rejected. *See* Pet. App. 49a-53a (rejected instructions), 54a (actual instructions). As Justice Breyer explained in *BMW*, "where legal standards offer virtually no constraint, . . . this lack of constraining standards warrants this Court's detailed examination of the award." 517 U.S. at 596 (Breyer, J., concurring).[15]

This case compellingly demonstrates the need for "thorough, independent review," *Cooper Indus.*, 532 U.S. at 441, of punitive damage verdicts. "A verdict returned by a biased or prejudiced jury no doubt violates due process." *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring). But here, notwithstanding the trial court's findings that the jury was biased and prejudiced, the court of appeal simply assumed that that same jury had decided every fact against Ford, and that those imagined "findings" were written in stone. The court of appeal then aggravated its error by relying on its assumption that the trial court "impliedly" endorsed those nonexistent jury findings, even though that same trial court had *overturned the jury's verdict* as "fundamentally suspect." Pet. App. 37a, 45a. This form of appellate review is irrational and unconstitutional, and warrants this Court's review.

CONCLUSION

The Court should grant certiorari and set this case for plenary consideration or, in the alternative, hold this petition pending its decision in *State Farm*. Respectfully submitted.

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15 "[T]he level of punitive damages is not really a 'fact' tried by the jury." *Cooper Indus.*, 532 U.S. at 437 (quotation omitted). Thus, the court below had no more reason to defer to the "huge" and "somewhat arbitrary" amount chosen by the jury than to the hypothetical factual findings the jury never made.

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January 21, 2003

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JUAN RAMON ROMO, individually and as Administrator, etc., *et al.*, Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY, Defendant and Appellant.

No. F034241
(Super. Ct. No. 82318)

Court of Appeal, Fifth District, California

June 28, 2002

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Counsel:

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Snell & Willmer, Douglas W. Seitz, Richard A. Derevan, Barry C. Toone; Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., Mark A. Perry, Tanya M. Acker, William E. Thompson; Dryden, Margoles, Schimaneck, Kelly & Wait and Frank P. Kelly III for Defendant and Appellant.

VARTABEDIAN, Acting P.J.

This case involves an appeal and a cross appeal after the trial court granted in part and denied in part defendant Ford Motor Company's posttrial motions. The court denied defendant's motion for new trial on liability and compensatory damages; denied defendant's motion to reduce punitive damages as excessive; and denied defendant's motion for judgment notwithstanding the verdict (JNOV). From these orders defendant appeals. The court granted defendant's motion for new trial on punitive damages grounded on juror misconduct; from this order plaintiffs appeal.

We will affirm the judgment for compensatory damages as modified by the trial court. We will affirm the trial court's denial of the JNOV motion. We will conclude the punitive damages award was not excessive. However, we will conclude the trial court erred in granting the new trial motion on punitive damages grounded on juror misconduct.

FACTS AND PROCEDURAL HISTORY

Ramon Romo bought a used 1978 Ford Bronco in 1992. On June 20, 1993, Ramon's son, plaintiff Juan Ramon Romo, was driving the Bronco; other members of the family—Ramon, his wife, Salustia, and his children Ramiro, Evangelina, and Maria—were passengers. Juan and Ramon were seated in the front, wearing seat belts. Salustia and Ramiro were in the back seat, also belted. Evangelina and Maria were asleep in the rear of the Bronco, unbelted.

Juan was involved in an accident and the Bronco rolled over several times. The 1978 Bronco had a steel roof over the front one-third of the passenger compartment. The rear two-thirds was made of fiberglass. As the Bronco rolled, the steel roof collapsed, killing Ramon Romo. The fiberglass roof broke loose, striking and killing Salustia and Ramiro Romo. Evangelina and Maria Romo were thrown from the car and injured. Juan remained in the car and was injured.

Juan Romo, individually and as administrator of the estates of the deceased family members, Evangelina Romo, and Maria Irene Romo through her guardian ad litem Juan Romo, sued defendant on theories of products liability and negligence; they sought compensatory and punitive damages.

Defendant did not request a bifurcated trial on the amount of punitive damages. (See Civ. Code, § 3295, subd. (d).)

The unified trial lasted from March 1999 through July 1999. At the conclusion of trial, the matter was submitted to the jury for deliberation on all issues. The jury deliberated for a week and returned a verdict for plaintiffs and against defendant. The jury awarded $6,226,793 in compensatory damages and $290 million in punitive damages. In accordance with the jury's allocation of fault (the jury concluded plaintiff Juan Romo was 10 percent at fault, defendant was 78 percent at fault, and the driver of a second vehicle was 12 percent at fault) and based on certain technical issues concerning damages awarded to the estates, the court reduced the compensatory damages to $4,935,709.10. This reduction is not an issue on appeal. Based on its findings of juror misconduct, which we will discuss in more detail below, the court granted defendant's motion for new trial on the issue of punitive damages.

The parties filed timely notices of appeal.

DISCUSSION

I. *Plaintiffs' Cross-appeal of Juror Misconduct Determination*

Plaintiffs have appealed, primarily, from the court's order granting defendant's motion for new trial on punitive damages. Second, plaintiffs contend the "jury's punitive damage award was not excessive as a matter of California or Federal law." The trial court did not grant the new trial based on excessiveness of damages; instead, it denied the new trial motion "on all other grounds specified" in defendant's notice of

motion for new trial. Plaintiffs, therefore, were the prevailing parties on this issue. We address the issue of excessiveness of damages only in defendant's appeal, in part II of this opinion. In part I, we address the order for new trial on punitive damages based on the trial court's finding of juror misconduct.

A. *Standard of Review*

As recently reiterated by the Supreme Court, an order granting a new trial under Code of Civil Procedure 657 "'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.]" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal. 4th 405, 409.) "The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' [Citation.] Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Id.* at p. 412.)

In the context of an order granting or denying a new trial motion on the basis the verdict is "contrary to law or evidence" (Pen. Code, § 1181, subd. 6), the trial court has broad discretion "and there is a strong presumption that it properly exercised that discretion." (*People v. Davis* (1995) 10 Cal. 4th 463, 524.)

When the trial court's order is based on a finding of juror misconduct, however, our deference to the trial court's order is more limited. "We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal. 4th 561, 582.)

Defendant contends the standard of review of the order granting a new trial is abuse of discretion. Quoting *Malkasian v. Irwin* (1964) 61 Cal. 2d 738, 748, defendant contends, "A trial court's decision granting (as opposed to denying) a new trial on the ground of jury misconduct may be reversed 'only in rare instances and on very strong grounds.'"

Reliance by defendant upon *Malkasian* is misplaced: that case involved misconduct of counsel during the trial. (*Malkasian v. Irwin*, *supra*, 61 Cal. 2d at pp. 745-747.) In evaluating the misconduct of counsel committed in the trial court's presence, that court certainly is in a better position than the appellate court to determine the net effect of such misconduct in the overall context of the trial. By contrast, in the case of juror misconduct occurring outside the presence of the trial court, the Supreme Court specifically has instructed that the reviewing court must independently apply an objective standard to determine whether the misconduct was prejudicial. (*In re Hamilton* (1999) 20 Cal. 4th 273, 296.)

Likewise, defendant's reliance on *Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th 405 is misplaced. In that case, the court considered the standard of review for a grant of new trial based on excessive damages and insufficiency of the evidence. (*Id.* at p. 412.) In such a case, the trial court sits as an independent trier of fact and, as in the context of *Malkasian v. Irwin*, *supra*, 61 Cal. 2d 738, the trial court "sits much closer to the evidence, . . . watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials." (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th at p. 412.)

The abuse of discretion test is inapplicable in cases of juror misconduct and, in light of the more recent Supreme Court statements on this point (see also *People v. Cromer* (2001) 24 Cal. 4th 889, 901), we must disagree with the

statement in *Bell v. State of California* (1998) 63 Cal. App. 4th 919, 930-931, to the contrary. We now turn to the evidence upon which we exercise our independent review.

B. *The Juror Declarations*

1. *The Television Program*

Both parties submitted juror declarations in connection with the posttrial motions. The declarations established, and the trial court found, that one juror, Ms. S., brought to the attention of the remaining jurors a segment of the television program *60 Minutes II* dealing with fires in older Ford Mustangs. Uncontested portions of the declarations established that S.'s discussion of the television program occurred during the jury's discussion of the issue of malice, after all issues concerning liability and compensatory damages had been resolved in plaintiffs' favor by unanimous vote of the jury.

Uncontested portions of the declarations established that S. reported to the jury that in the course of the program former Ford president Lee Iaccoca stated that Ford had a policy of contesting or settling lawsuits involving the Mustangs because it was less costly than recalling the vehicles and repairing them. Uncontested portions of the declarations established that S. mentioned the program on one occasion and that her discussion of the program took less than five minutes. Uncontested portions of the declarations established that the jury foreperson, Ms. B., told S. the program was not evidence in the present case and should not be discussed further. S. told the other jurors she agreed and the matter was never raised again.

The trial court made no findings contrary to these undisputed portions of the declarations, although the trial court did find that other persons interviewed in the *60 Minutes II* segment, and not Ford representatives, actually made the claims concerning the decision not to recall the Mustangs.

Conflicting portions of the declarations centered around whether S. said she had watched the program or had been told about it. Further, the declarations conflicted about the context in which S.'s comments were made. The declarations agreed the jurors were in conflict over the type of evidence necessary to show malice, some contending that documentary evidence was necessary. Most declarations stated that S. brought up Iaccoca's purported statements as an example of the manner in which nondocumentary evidence could demonstrate malice as a general matter. The trial court interpreted two other declarations to state that S. proffered Iacocca's statements as evidence of malice in the present case. The trial court did not resolve the conflicts in the evidence, finding only that the declarations "alleged" that S. had made the various statements attributed to her.

The declarations also established that at some point after S. made her statements about the television program, several jurors expressed the belief that the testimony of a particular Ford witness (Mr. Darold) was highly relevant—and damaging to defendant—on the issue of malice. The jury requested a reading of a portion of that testimony. The morning of the read-back, the trial court also reinstructed the jury that it was not to consider outside evidence in connection with the present case. (The parties were concerned about widespread news reports concerning punitive damages awarded by a jury in a case against General Motors.) Only after this reinstruction and after the read-back of testimony did the jury vote, nine to three, in favor of a finding of malice.

2. *The Dream*

The declarations agreed that a juror, Ms. Z., recounted to the jury a dream she said she had the night before. In a scene that kept repeating during the dream, a Ford Bronco rolled over, sequentially killing each of her children and then the children of each of the other jurors. While the Bronco rolled, Z. said, Ford representatives stood by, chanting, "Where's

the proof?" She recounted the dream only one time, during deliberations on the issue of malice; the dream was not discussed at any other time. Z.'s telling of the dream occurred on the fourth day of deliberations, after the votes on liability and compensatory damages, but before the vote on malice.

The declarations conflicted about whether Z. described the dream as an "omen." The trial court did not resolve the conflict in the evidence. Although defendant asserts the trial court "specifically credited evidence that [Juror Z.] . . . relied (and encouraged her fellow jurors to rely) on that dream in determining Ford's liability for punitive damages," the trial court made no such finding. Rather, the court simply set forth the evidence: "This same juror allegedly also told her fellow jurors that her dream was an 'omen,' thereby suggesting that it had some sort of mystical significance regarding how to vote in the case."

Even if we disregard the trial court's use of the word "allegedly"—which is the antithesis of "specifically credit[ing]" the evidence[1]—there is no statement in any of the declarations that Z. claimed her dream had mystical significance. The only statement even marginally related to such a claim was this statement in B.'s first declaration: "In other words, Juror [Z.] personalized her dreams to include, not only her own children, but other jurors' children, and as above stated, stated that [the jury's] job was not about following the law, but 'saving children.'" This statement does not constitute substantial evidence that Z. attached mystical significance to

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[1] For example, in defendant's response brief filed in the cross-appeal, counsel write (with our italics added): "It is also undisputed that during deliberations, Ms. [S.] misattributed the extremely prejudicial quote about settling cases rather than recalling *allegedly* defective vehicles to Mr. Iacocca."

the dream and used it as the basis—in disregard of the law and the evidence—for her votes on punitive damages.

3. *Prejudgment by a Juror*

Although the declarations conflicted greatly on the details, most of the declarations agreed that Z. repeatedly said during deliberations that the jury must "save the babies" by finding defendant liable.

Juror declarations submitted by defendant tied this statement to statements by Z. to the effect that saving lives was too important and the jury did not need to follow the law to accomplish this goal. Of the three declarations submitted by defendant, one stated Z. made these statements "many times during the various days of jury deliberation" and "on several of the deliberations days" (Juror H.), one declaration stated Z. made the statements on the first day of deliberations only (Juror W.), and one declaration stated she made the statements on the first two days of deliberations only (Juror B.).

Juror declarations submitted by plaintiff stated that Z. expressed particular concern because the rear roof of the Bronco was made of fiberglass, affording the least protection in a rollover accident, yet people tended to put their babies in the back seat of a car to try to give them added safety. She said defendant would not do anything to remedy the situation if the jury did not punish it. Z. and other declarants specifically denied Z. said the jury did not need to follow the law. Four of the six juror declarations submitted by plaintiff state that early in the deliberations there was a discussion about the need to follow the law, that the foreperson (B.) reiterated that the jury had to follow the law, and that all jurors agreed they needed to and would follow the law.

Various of the declarations alleged and denied that Z. said she had made up her mind about the case during the trial and that the jury should treat "as evidence" the statements of one of plaintiffs' attorneys.

The trial court did not expressly resolve the conflicts in the evidence, although the court did state its conclusion that "[j]uror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case and a refusal to follow the law. The alleged misconduct occurred on the second day of deliberations."

C. *The Trial Court's Conclusion*

In its written order granting a new trial on punitive damages, the trial court recounted in detail the contents of the three juror declarations submitted by defendant. The court then wrote:

> "The Court finds that the counter-declarations submitted by plaintiffs fail to rebut the presumption of prejudice in this case. Juror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case and a refusal to follow the law. The alleged misconduct occurred on the second day of deliberations. The jury voted 12-0 on the issues of liability and compensatory damages. However, the jury voted 9-3 on the issues of malice and the amount of punitive damages.
>
> "Because there was a bare majority on the issues of malice and the amount of punitive damages and because the standard of proof as to malice is so high, the Court finds the deliberative process on these two (2) issues was presumptively infested with passion and prejudice as to render the verdict on punitive damages fundamentally suspect. If not singly, then in combination, the juror misconduct described above was presumptively prejudicial and such presumption has not been rebutted.

> "Despite admonitions from the Court, in essence, not to consider anything but the facts and the law, and despite other jurors' admonitions not to consider the external evidence and influences discussed above, the jury was being told not to think of the proverbial pink elephant. The damage was presumptively done."

D. *The Issue of Presumptions*

Jury deliberations are secret while they are occurring. No verbatim transcript or other record of the deliberations normally exists. Declarations seeking to reconstruct deliberations after the fact may be colored by the jurors' natural inclination to protect or attack the process that resulted in the verdict, depending on whether the juror agreed or disagreed with the verdict. (See *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal. 3d 98, 108-109.) Yet, the parties' right to a jury trial is one of constitutional dimension, and we give great deference to a verdict issued by a properly instructed jury—in the normal case, without any inquiry whatsoever into the processes used to reach that verdict. Even when there are allegations of jury misconduct, evidence of the jurors' mental processes is, "with narrow exceptions," excluded from consideration of the right to a new trial. (*In re Hamilton, supra*, 20 Cal. 4th at pp. 294-295.)

Common experience requires that we recognize that while the "jury system is . . . legally fundamental . . . [it is] also fundamentally human." (*People v. Marshall* (1990) 50 Cal. 3d 907, 950.) Jurors bring to their deliberations knowledge, beliefs, personalities, and intellectual capacities, which the judicial system must accept as both a strength and a weakness of the jury system. (*Ibid.*; see also *People v. Keenan* (1988) 46 Cal. 3d 478, 541.)

Faced with the twin facts that jurors are allowed great freedom in their conduct of deliberations and that a court can never know exactly what influences resulted in a particular

verdict, our judicial system has established certain presumptions for reviewing allegations of juror misconduct.

Jurors ordinarily are presumed to have followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal. 4th 834, 852; *Craddock v. Kmart Corp.* (2001) 89 Cal. App. 4th 1300, 1308.) "The California Supreme Court has consistently stated that on appeal, '[w]e must, of course, presume that the jury followed [the trial court's] instructions . . . .' (*People v. Chavez* (1958) 50 Cal. 2d 778, 790.) . . . 'In the absence of evidence to the contrary, the presumption [that the jury adhered to the limiting instructions] will control.' (*People v. Beach* (1983) 147 Cal. App. 3d 612, 625.)" (*People v. Zack* (1986) 184 Cal. App. 3d 409, 416.)

On the other hand, "[j]uror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias." (*People v. Nesler*, *supra*, 16 Cal. 4th at p. 578.) "To succeed [on a claim of jury misconduct, a party] must show misconduct on the part of a juror; if he does, prejudice is presumed; [the opposing party] must then rebut the presumption or lose the verdict." (*People v. Marshall*, *supra*, 50 Cal. 3d at p. 949.)

The presumption of prejudice in a civil case is rebutted if the reviewing court reaches one of three conclusions: (1) the record establishes the absence of prejudice; (2) a review of the entire record shows there is no reasonable probability of actual harm to the complaining party under the constitutional standard of *People v. Watson* (1956) 46 Cal. 2d 818, 836 (see *Hasson v. Ford Motor Co.* (1982) 32 Cal. 3d 388, 416-417; *McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal. App. 4th 256, 265); or (3), in the case of possible "actual bias" of a juror whose vote may have been determinative of the verdict, there is no substantial likelihood that at least one juror was impermissibly influenced. (See

Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1679-1680, disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal. 4th 30, 41; see also *Weathers v. Kaiser Foundation Hospitals, supra,* 5 Cal. 3d 98, 110.)

The interaction of the two foregoing presumptions is seen in *People v. Marshall, supra,* 50 Cal. 3d 907. In that death penalty case, during the jury's penalty phase deliberations, a juror claiming a law enforcement background stated to the other jurors that the absence of a known criminal record for the defendant was not determinative because "'juvenile records are automatically sealed at 18 years of age.'" (*Id.* at p. 949.) The Supreme Court concluded that this was misconduct that raised a presumption of prejudice. (*Id.* at p. 951.) However, the court then applied the presumption that the jury would understand and follow the instructions from the court; those instructions, in this particular case, rendered the issue of a prior criminal record immaterial to the penalty determination. (*Id.* at p. 952.) Accordingly, the court held, the record established that the presumption of prejudice was rebutted. (*Id.* at p. 951.)

E. *Analysis*

As noted, the trial court did not expressly resolve the many factual conflicts presented by the various declarations. Implicit in the court's conclusion, however, is a finding that the declarations submitted by plaintiffs were credible at least to the extent they described the verbal response of other jurors, the timing of the remarks by S. and Z., and the uncontradicted fact that the remarks were not the subject of discussion after the read-back of the testimony of the Ford employee, Darold. Thus, the court concluded: "Despite admonitions from the Court, in essence, not to consider anything but the facts and the law, and despite the other jurors' admonitions not to consider the external evidence and influences discussed above, the jury was being told not to think of the

proverbial pink elephant. The damage was presumptively done." The only claims that other jurors admonished Jurors S. and Z. were contained in the declarations submitted by plaintiffs.

Despite this finding concerning jury self-admonition, it appears to us the trial court applied only the presumption that jury misconduct is prejudicial and, without any evidentiary basis for doing so, failed to consider and apply the presumption that jurors have followed the instructions they were given. In our independent review of the issues of prejudice and rebuttal of the presumption of prejudice, we conclude the record provides no basis to reject the normal presumption the jury followed the instructions. Accordingly, as we explain, we conclude the presumption of prejudice is rebutted.

The declarations establish that S. made her comments about the *60 Minutes II* segment on Thursday or Friday. Also prior to the weekend, the jury asked the court for a read-back of a portion of Darold's testimony concerning Ford's state of knowledge. Over the course of the ensuing weekend, there was substantial news coverage of a massive punitive damages verdict rendered in a case against General Motors during the previous week. As a result of concern that the jury might be influenced by the size of the General Motors verdict, the court—without any explanation to the jury about *why* it was doing so—instructed the jury prior to the commencement of deliberations on the following Monday, July 12, 1999:

"Ladies and gentlemen, you're going to resume your deliberations here shortly, but just a reminder to you: During the course of the trial, the Court admonished you that you are not to read or listen to or pay attention to any news accounts concerning this case; that you are to decide this case based on the law and the facts of the evidence that was presented to you during the course of the trial. The Court wanted to repeat that admonition to you that again you are to decide this

case based on the law, the facts and the evidence that are presented to you during the course of the evidence in the trial. You are not to read or listen to or consider, if you have, taken [*sic*] into account any newspaper articles concerning this case, any radio accounts or any television or any other media accounts concerning this case or any other case. You are to decide this case based on the facts and the law and the evidence presented during the course of this trial; okay?"

In addition, there is no conflict in the evidence showing the foreperson of the jury admonished S. that the *60 Minutes II* segment could not be used as evidence in the present case, nor is there conflict in the evidence showing S. expressly agreed with this admonition. There is no conflict in the evidence showing that the *60 Minutes II* issue was never mentioned again after this exchange between the foreperson and S. Because the jury is presumed to have followed the court's subsequent instruction to decide the case only on the evidence and law presented, and because there is no evidence to overcome that presumption, we conclude the presumption of prejudice from mention of the *60 Minutes II* segment is rebutted by the record. (*People v. Marshall*, *supra*, 50 Cal. 3d at p. 952.)

Similarly, Z.'s dream was never the subject of discussion after the court's admonition of Monday, July 12, 1999. We digress to note that defendant has not cited any cases for the proposition that having or talking about a dream while serving on a jury constitutes misconduct. Having a dream, in itself, cannot be considered the receipt of extrinsic evidence by the dreamer, since the dream is entirely an internal affair. The report of the dream—Z.'s statements to her fellow jurors—seems to us well within the realm of permissible rhetorical devices, merely another way of saying that the speaker finds the evidence very persuasive and that she fears other similar accidents if the product were not to be recalled by the manufacturer. Certainly such a statement in the latter terms

would not constitute misconduct. No reason occurs to us why the use of the dream formulation to increase the rhetorical impact of the statements would be any less permissible. (Cf. *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal. App. 4th 803, 819.)

To return to our main point: even assuming the dream statements constituted misconduct, they were brief, the dream was not claimed to be evidence, and the dream was not discussed after the July 12, 1999, admonition. Because the jury is presumed to have followed the instruction to decide the case only on the evidence and law presented, and because there is no evidence to overcome that presumption, we conclude any presumption of prejudice from the dream statements is rebutted by the record. (*People v. Marshall*, *supra*, 50 Cal. 3d at p. 952.)

The greatest level of conflict in the declarations concerns the claims that Z. said she had prejudged the case and said the jury did not "need to follow the law" because of an overriding responsibility to "save the babies." Those jurors who claimed Z. voiced an intention to disregard the law all said she made these statements on the first day or the first couple of days of deliberations. It was during this time that the jury deliberated the issues of liability and compensatory damages. There is no indication in any of the declarations that Z. made similar statements during the more contentious punitive damages deliberations. In fact, it is uncontradicted that the statements ceased well before the court's July 12, 1999, admonition to decide the case on the evidence alone. Because the jury is presumed to have followed the instruction to decide the case only on the evidence and law presented, and because there is no evidence to overcome that presumption, we conclude the presumption of prejudice from Z.'s possible expressions of prejudice and refusal to follow the law is rebutted by the record. (*People v. Marshall*, *supra*, 50 Cal. 3d at p. 952.)

A similar issue arose in *People v. Harper* (1986) 186 Cal. App. 3d 1420. In that murder case, the jury was having trouble interpreting the instructional definition of murder. A juror brought in a dictionary and read to the other members the dictionary definition of murder. That juror "was immediately cautioned by other members of the jury that his definition could not be considered." (*Id.* at p. 1428.) Seeking further instruction from the trial court, the jury sent out a note that disclosed that the juror had consulted the dictionary. (*Ibid.*) The trial court then brought out the jury, explained generally why dictionary definitions are not applicable in criminal prosecutions, and admonished the jury to "put aside any discussion or consideration" of the dictionary definition. (*Id.* at p. 1429.)

The appellate court held: "Absent evidence to the contrary, a jury is presumed to follow the instructions of the trial court. Having been given a specific admonishment in light of misconduct by one of their members, it seems probable the jurors would more closely adhere to the instructions of the trial court and thus reduce the chance for prejudice." (*People v. Harper*, *supra*, 186 Cal. App. 3d at pp. 1429-1430.) Agreeing with the trial court's conclusion, the reviewing court stated: "[I]t was unnecessary to rely on a presumption the jurors . . . followed the admonition when the declarations [of the jurors] made clear there was no further discussion of the dictionary definition." (*Id.* at p. 1430.) The court concluded the presumption of prejudice arising from the juror's misconduct had been rebutted. (*Ibid.*; see also *People v. Pinholster* (1992) 1 Cal. 4th 865, 925.)

In the present case, of course, the jury did not inform the trial court that there had been reference by a juror to a television program and an appeal by another juror to the overriding moral necessity of saving the lives of children. Nevertheless, the court fortuitously instructed the jury to confine its deliberations and consideration of the case solely to the evidence

presented at trial. The instruction did not mention the General Motors verdict that had caused the parties to request it; for all the members of this jury knew, the court somehow had ascertained that extraneous materials were being mentioned in the jury room. In any event, the record is clear that none of the misconduct was repeated in any manner after the court's admonition. As in *People v. Harper*, *supra*, 186 Cal. App. 3d at page 1430, the record rebuts the presumption of prejudice arising from the jury misconduct in this case.

Finally, we consider whether the evidence establishes that, even if the record rebuts the presumption of prejudice as to the jury as a whole, there is a substantial likelihood that a juror necessary to the punitive damages verdict prejudged the case. (See *Province v. Center for Women's Health & Family Birth*, *supra*, 20 Cal. App. 4th at pp. 1678-1679.) "For a juror to prejudge the case is serious misconduct." (*Clemens v. Regents of University of California* (1971) 20 Cal. App. 3d 356, 361.) Thus, where a juror initially failed to disclose his prejudgment of the case during voir dire and subsequently repeated that prejudged position throughout the trial and deliberations, the court found prejudicial misconduct. (See *id.* at pp. 365- 366.) Similarly, where a juror prejudged the case and coerced the rest of the jury into an immediate vote without any deliberation, the court found prejudicial misconduct. (*Province v. Center for Women's Health & Family Birth*, *supra*, 20 Cal. App. 4th at pp. 1678, 1680.)

In this case, the trial court impliedly found that Juror Z. stated to the other jurors that she had made up her mind about the case prior to the completion of all the testimony.

For reasons similar to those stated above, however, we find that Z.'s initial statements concerning readiness to decide the case without regard to the law does not rise to the level of prejudicial misconduct found in the foregoing cases. Rather, the record establishes that while early in the deliberations Z. may have misunderstood the nature of the jury's

function, the other jurors—particularly the foreperson, identified as a deputy district attorney—admonished her concerning the necessity to follow the law as instructed by the court. None of the juror declarations contend Z. persisted in a refusal to consider the law and the evidence, and several declarations—including Z.'s—state that she affirmatively agreed that the jury needed to follow the law. On this record, it is not substantially likely that Z. prejudged the case and failed to decide the case on the law and evidence presented at trial. (*In re Hamilton, supra,* 20 Cal. 4th at p. 296.)

F. *Conclusion*

Defendant urges that we adopt what amounts to a rigid rule that prejudicial misconduct cannot be cured either by jury self-admonition or by admonitions from the trial court. Such a contention ignores the very purpose of permitting and requiring jury deliberations: through group discussion of the law and the evidence, our common law system trusts that jurors who express wrong ideas about the evidence, the law, and their duty as jurors will be guided to a correct view of the case. In the absence of an opportunity for jurors to express such wrong conceptions and thereafter change their thinking, a jury trial might just as well conclude with the submission of ballots from the jury box at the close of the case.

Despite defendant's consistent attempts to portray this as a case of jurors run amok, the misconduct in the present case does not begin to approach the pervasive and insistent misconduct that resulted in reversal in such cases as *People v. Nesler, supra,* 16 Cal. 4th 561, *Province v. Center for Women's Health & Family Birth, supra,* 20 Cal. App. 4th 1673, and *Clemens v. Regents of University of California, supra,* 20 Cal. App. 3d 356. Instead, in the present case, by all of the evidence in the record, the collective process of jury deliberation resulted in disabusing jurors S. and Z. of any misconceptions they may have had concerning their duty as

jurors to follow the law and consider only the evidence at trial. As such, the presumption of prejudice was rebutted.

II. *Defendant's Appeal*

Defendant appeals from the trial court's order denying its motion for JNOV on the issue of punitive damages. Defendant also appeals from the trial court's denial of defendant's new trial motion on liability and compensatory damages. Finally, defendant contends the punitive damages award is the "grossly excessive product of bias, passion and prejudice."

We will address these issues in the following order. First, we will consider whether substantial evidence supports the jury's finding on malice, the linchpin of its punitive damages verdict. Next, we will address the issue of excessiveness of punitive damages. Because we have found there was no prejudicial jury misconduct, the claim that the trial court erred in denying a new trial on liability and compensatory damages—a claim premised on the same allegations of jury misconduct—is moot.

A. *Substantial Evidence*

Defendant contends "plaintiffs failed as a matter of law to prove that Ford can be held liable for punitive damages." "This argument calls for our determining whether substantial evidence supported the jury's verdict." (*Hardison v. Bushnell* (1993) 18 Cal. App. 4th 22, 25-26.)

1. *Standard of Review*

"'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal. 2d 427, 429.) We must therefore view the evi-

dence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' (*Jessup Farms v. Baldwin* [(1983)] 33 Cal. 3d [639,] 660.)" (*Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal. App. 4th 1156, 1166.)

On appeal from an order denying judgment notwithstanding a jury's verdict, we independently apply the same standard as the trial court, that is, the substantial evidence test stated above. (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal. App. 4th 234, 259.) Thus, where the trier of fact has concluded "that the clear and convincing standard has been met, and there is substantial evidence to support it, then we must affirm." (*Mike Davidov Co. v. Issod* (2000) 78 Cal. App. 4th 597, 606.)

Our standard of review is no different where, as here, the challenge to the sufficiency of the evidence arises in the context of a punitive damages verdict. Defendant seeks support for a heightened standard of review by relying upon the maxim that California law "disfavors punitive damages." That reliance is unavailing.

Defendant's premise is correct, in a limited way: When the issue is whether to permit administrative agencies to award such damages in the absence of a legislative mandate (see *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1392) or to permit lost punitive damages as a component of compensatory damages in legal malpractice suits (see *Piscitelli v. Friedenberg* (2001) 87 Cal. App. 4th 953, 981-982), the common law indeed disfavors expanding the availability of punitive damages.

Where the Legislature has provided for such damages under specified conditions, however, it is the function of the judiciary to review a jury verdict pursuant to the law as written—not to favor or disfavor, approve or disapprove, the

Legislature's choice in providing for such damages. "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 53.) (We consider defendant's constitutional arguments later.)

Defendant also suggests our review of the verdict and of the order denying the JNOV motion must be elevated beyond ordinary substantial evidence review because the punitive damages statute (Civ. Code, § 3294) requires proof of malice by clear and convincing evidence. This contention is wrong if, by it, defendant means to imply that we give less deference to the facts and inferences found by the trier of fact.

Defendant's contention, understood in this way, ignores the fact that courts routinely apply the substantial evidence standard in criminal cases, where the burden of proof is beyond a reasonable doubt. (See, e.g., *People v. Lewis* (2001) 25 Cal. 4th 610, 642; *People v. Marshall* (1997) 15 Cal. 4th 1, 34; *People v. Johnson* (1980) 26 Cal. 3d 557, 578.)

We reiterate, then, that in reviewing a punitive damages verdict, just as in reviewing a criminal verdict or an ordinary civil verdict, we give full deference to the trier of fact. Thus, even though the Legislature added a "clear and convincing evidence" requirement to the punitive damages statute, it did not alter "the standard of our review (all we are required to find is substantial evidence to support a determination by clear and convincing evidence [citation]) . . . ." (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal. App. 4th 1269, 1287.)

2. *Corporate State of Mind*

Defendant contends the evidence was insufficient to prove it acted with malice in designing and manufacturing

the 1978 Bronco or in failing to warn consumers about the absence of rollover protection. Underlying this argument is a fundamental misconception of the required proof, stated in defendant's reply brief as follows: "Section 3294 [authorizing punitive damages] makes absolutely clear that plaintiffs were required to introduce clear and convincing proof that *at least one particular Ford employee, officer, director or managing agent* had the requisite malicious state of mind in 1978." (Italics in original.)

Since 1980, Civil Code section 3294, subdivision (b), has provided, in relevant part: "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." The purpose of the amendment was to clarify the existing common law requirement that corporate malice occur at the level of "employees [who] exercised substantial discretionary authority over decisions that resulted in an 'ad hoc formulation of policy' . . . ." (*White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 571, citation omitted.)

In adopting the amendment, the Legislature sought language that would express the requirement that punitive damages liability for employers requires more direct involvement by the employer than ordinary respondeat superior liability, but also sought to make clear that such liability did not attach only to the acts of those "employed in a managerial capacity." (See *White v. Ultramar, Inc.*, *supra*, 21 Cal. 4th at pp. 571, 576.) The adopted language reflects a legislative intent "that principal liability for punitive damages not depend on employees' managerial level, but on the extent to which they exercise substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation could be managing agents." (*Id.* at pp. 576-577.)

In *White v. Ultramar, Inc., supra*, the Supreme Court concluded that the present version of Civil Code section 3294, subdivision (b), sought to preserve the pragmatic stance adopted in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal. 3d 809, 822-823. "*Egan* observed that a corporate defendant should not be able to shield itself '"from liability by giving an employee a nonmanagerial title and relegating to him crucial policy decisions."'" (*White v. Ultramar, Inc., supra*, 21 Cal. 4th at p. 571.) The operative inquiry is whether the employee's exercise of discretion results in actual, even if "ad hoc," corporate policy. (*Ibid.*)

In most of the cases in which the "managing agent" issue has resulted in reversal of a punitive damages award, initial liability arises from a particular tortious act of an employee of the corporation. (See, e.g., *Cruz v. HomeBase* (2000) 83 Cal. App. 4th 160, 167; see also *White v. Ultramar, Inc., supra*, 21 Cal. 4th at p. 577.) Defendant has cited no case, and our own research has failed to disclose any case, in which a series of corporate actions and decisions, such as the design, production, and marketing of an automobile, has been found inadequate to support an award of punitive damages on the basis that the multitude of employees involved in various aspects of the process were not high enough in the corporate chain of command. When the entire organization is involved in the acts that constitute malice, there is no danger a blameless corporation will be punished for bad acts over which it had no control, the primary goal of the "managing agent" requirement. (Cf. *Grimshaw v. Ford Motor Co.* (1981) 119 Cal. App. 3d 757, 814.)

There is no requirement that the evidence establish that a particular committee or officer of the corporation acted on a particular date with "malice." A corporate defendant cannot shield itself from liability through layers of management committees and the sheer size of the management structure. It is enough if the evidence permits a clear and convincing

inference that within the corporate hierarchy authorized persons acted despicably in "willful and conscious disregard of the rights or safety of others." (See Civ. Code, § 3294, subd. (c)(1).)

A plaintiff may satisfy the "managing agent" requirement of Civil Code section 3294, subdivision (b), through evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated. These inferences cannot be based merely on speculation, but they may be established by circumstantial evidence, in accordance with ordinary standards of proof.

Defendant contends, in addition, that plaintiffs failed to prove defendant engaged in "despicable" conduct within the meaning of Civil Code section 3294, subdivision (c)(1). This argument focuses on individual acts and decisions of defendant's employees, while complaining that plaintiffs attempt to "create a composite picture of alleged 'maliciousness' by imputing to some fictional monolith bits and pieces of supposed knowledge of many different people on many different topics through many different decades."

Stripped of pejorative innuendo, defendant clearly is a "fictional monolith": corporations are legal constructs—legal fictions (*Francis T. v. Village Green Owners Assn.* (1986) 42 Cal. 3d 490, 507)—and defendant is a single such construct. It is difficult to imagine how corporate malice could be shown in the case of a large corporation except by piecing together knowledge and acts of the corporation's multitude of managing agents.

Defendant also asserts that plaintiffs are "unable to present evidence of any 'malicious or despicable' conduct with respect to the design and production of the 1978 Bronco." This ignores the fact that the design and production of the vehicle was the despicable conduct: we think it obvious that

putting on the market a motor vehicle with a known propensity to roll over and, while giving the vehicle the appearance of sturdiness, consciously deciding not to provide adequate crush protection to properly belted passengers (in the words of a corporate memo introduced in evidence, "penalizing" passengers for wearing a seatbelt) constitutes despicable conduct. Such conduct could kill people. The question is not whether the conduct, if it occurred, was despicable, the question is whether there is sufficient evidence from which a rational trier of fact could find that the knowing conduct occurred.

Defendant's attack on the sufficiency of the evidence includes discussions of the evidence of a manufacturing defect and of defendant's failure to include rollover warnings with the 1978 Bronco. We will not examine this evidence, since plaintiffs did not rely on it to prove malice. Instead, we will turn directly to the third component of plaintiffs' case, proof of a design defect.

Attacking the sufficiency of the evidence of design defect, defendant contends plaintiffs' own evidence showed "conclusively" that negligent *manufacture* of the Bronco, not negligent design, caused the deaths and injuries involved in this case. Had it not been for defective welds along the roof pillar, "the metal portion of the roof would not have crushed," according to defendant; "if the roof had not crushed in the entire Romo family . . . would have 'walked away' from the accident." This claim wholly ignores the requirement that we view the evidence in the light most favorable to the verdict, as we will explain.

Plaintiffs did present evidence that the Bronco was not only poorly designed but that it also was negligently manufactured. Plaintiffs presented testimony from a metallurgy/materials-failure expert, Dean Jacobson, to the effect that the front roof pillar was negligently welded. And he testified that those welds failed and caused the passenger side of

the Bronco's roof to "splay out" as it collapsed. But he also testified that if the welds had been good, only the passenger side of the steel roof "would have stayed up. It would have mitigated the amount of intrusion on the right side [of the steel roof] and I believe basically the right side would have stayed up."

Jacobson did not testify that, in the absence of faulty welds, the entire Romo family would have walked away from the accident. To the contrary, defendant objected to Jacobson's expressing any opinions at all about the cause of the passengers' injuries, since he was not a biomechanics expert. However, Jacobson testified that the rear roof—the molded fiberglass roof—"would have been gone" even if the welds had been in accordance with the design specification. Of equal importance, Jacobson testified that if defendant had installed the type of integrated roll bar it initially planned for the 1978 Bronco and had installed the type of steel roll bar at the rear of the fiberglass roof that defendant did include on the 1980 Bronco, the roof would not have crushed despite the negligent welds. Thus, in essence, Jacobson testified that the design defects were a sufficient independent cause of the steel roof's collapse during the rollover.

Defendant's quotation from the record concerning the "entire Romo family" walking away from the accident if the roof did not collapse came from a different witness, plaintiffs' biomedical engineering expert, Martha Bidez. Her testimony had nothing to do with the causes for the collapse of the roof. Instead, she took the sequence of events established by the accident reconstruction expert and opined concerning the manner in which the various victims' injuries occurred during the course of the accident. For example, after the witness described the mechanism by which the minor victims were injured, she was asked, "Why didn't they sustain skull fractures like other members of the family?" Bidez answered, "The children in the back did not sustain skull frac-

tures because the roof did not crush in on top of them and the roof did not strike them in the head. [¶] The roof struck their mother and their brother, and [the girls] were able to simply be deposited out on the highway. There was no roof crush; that is what caused the death of their father."

To provide a summarization of Bidez's testimony, counsel asked, "If the roof doesn't crush in, what happens to the members of this family?" Bidez answered, "If the roof doesn't crush in . . . the Romo family stays intact. Every one of the family members . . . walk away from this collision."

We have engaged in this rather extended exposition of the evidence to demonstrate a point defendant repeatedly ignores in its briefs: substantial evidence review requires examination of all the evidence, not just selective portions of the evidence favorable to the appellant, and it requires evaluation of that evidence in the light most favorable to the verdict, not an interpretation that ignores the inferences drawn by the trier of fact. (*Jessup Farms v. Baldwin* (1983) 33 Cal. 3d 639, 660.) We will not repeat the exercise of fully demonstrating defendant's selective use of the evidence in each instance as we discuss its arguments; it will suffice to say that defendant's briefs repeatedly ignore this "elementary, but often overlooked principle" (*Crawford v. Southern Pacific Co.*, *supra*, 3 Cal. 2d 427, 4290) of appellate law.

Further attacking the sufficiency of the evidence of design defect, defendant contends the metal portion of the 1978 Bronco roof was "ahead of its time regarding roof strength." It contends the evidence established that there was no federal standard for roof strength when the Bronco was manufactured, but that the vehicle far exceeded the passenger car standard that existed then and exceeded the current light truck standard. "These facts, as a matter of law, preclude the imposition of punitive damages," according to defendant.

Viewing the evidence in the light most favorable to the verdict, however, a rational trier of fact could conclude that it

was merely coincidental that the Bronco met the later federal standards, and that this coincidence—occurring years after the design and production of the 1978 Bronco—did not reflect the corporate state of mind prevailing at the time in question. The standard for award of damages under Civil Code section 3294 is malice in fact (*Taylor v. Superior Court* (1979) 24 Cal. 3d 890, 894); the question of such malice does not turn on whether the relevant conduct is or is not reasonable in light of later-developed standards of care.

Instead, substantial evidence permits an inference that defendant's policymakers were strongly motivated to bring the 1978 Bronco to market and knew they could not do so if they followed the routine practice of preproduction testing and development. Substantial evidence supports an inference that, in order to bring the product to market, defendant's policymakers decided to disregard established policies by which defendant had determined that crush resistance needed to be higher (the twice-the-curb-weight standard) and that fiberglass or molded plastic should not be used for components comprising the passenger compartment unless underlain by a steel skeleton. Given the existence of these corporate standards and the total absence of preproduction testing, a rational finder of fact could infer that the failure to design and test the 1978 Bronco to meet these standards reflected "a willful and conscious disregard of the . . . safety" (Civ. Code, § 3294, subd. (c)(1)) of those who would travel in the Bronco.

In a similar manner, defendant attacks the sufficiency of the evidence of design defect of the fiberglass portion of the roof by pointing out plaintiffs' expert testimony that having a

removable roof on the Bronco was reasonable[2] and that defendant's designated "most knowledgeable" representative testified that, like a convertible's cloth top, the fiberglass roof was not designed to survive a rollover accident.

However, other evidence permitted a reasonable trier of fact to conclude that defendant's decision to put the unreinforced fiberglass roof was despicable because defendant knew that:

> —unlike convertible passenger cars, the high center of gravity of truck-based utility vehicles made them more likely than passenger cars to roll over;
>
> —defendant's safety engineers previously had concluded unreinforced fiberglass should never be used for a part of a vehicle intended to enclose the passenger compartment and had concluded no utility vehicle should be produced without a roll bar—and that the original design for the 1978 Bronco, in fact, included a roll bar as standard equipment;
>
> —the competitor's removable fiberglass roof did contain metal reinforcement;
>
> —defendant's own testing conducted after production and delivery of the 1978 Bronco

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[2] The expert did not testify that an *unreinforced* fiberglass roof was reasonable. He merely testified that a removable roof was reasonable. The earlier version of the Bronco, for example, had a removable steel roof. He was highly critical of the use of unreinforced fiberglass, combined with the absence of a roll bar, for the 1978 Bronco. In other words, contrary to the implication of defendant's excerpt, plaintiffs' expert did not express approval of the fiberglass roof on this vehicle.

> (testing defendant consciously decided not to undertake in order to bring the product to market more quickly, despite such testing as a routine part of product development for other vehicles) showed the roof failed to meet defendant's safety standards and led defendant to include steel reinforcement in the 1980 Bronco.

In light of this credible evidence, it is frivolous to contend, based on defendant's excerpts from the record, that "Ford's decision to incorporate a fiberglass roof into certain vehicles—even if retrospectively deemed incorrect two decades after the fact—was not, as a matter of law, a 'vile' or 'loathsome' act that can support an award of punitive damages," as defendant says in its opening brief.

Finally, defendant contends that the decision to use an unreinforced fiberglass top on the 1978 Bronco was never disclosed to "top management," citing the testimony of a former Ford executive who testified on behalf of plaintiff. The testimony of the former Ford executive, Thomas Feaheny, was somewhat different than represented by defendant. Feaheny testified: "The decision to put [the fiberglass top] on that vehicle was not a top management decision. It was made in the truck operations and the truck department. And I guess I'm fairly confident that they never disclosed to higher management that there was this risk" that the fiberglass roof "almost inevitably" would fail in a rollover accident.

Nevertheless, Feaheny testified that in the ordinary course of business, the responsible executives *within* the light truck division would have known about the safety engineers' conclusions concerning the use of unreinforced fiberglass for passenger compartment panels. These executives clearly had the power within the corporation to enforce or not enforce as company policy the safety engineers' findings.

As stated previously, the test for whether malicious conduct is attributable to a corporation is whether the acts were done by a person or persons with authority to make ad hoc policy decisions on behalf of the corporation. (*White v. Ultramar, Inc.*, *supra*, 21 Cal. 4th at p. 577.) Defendant does not contend, nor could it, that employees on the assembly line decided what roof to put on the Bronco or to delete the roll bar as standard equipment. Such decisions obviously were made with the input of many persons, but ultimately became policies of the corporation despite corporate knowledge that the choices entailed risk of death and serious injury.

The statutory standard for corporate malice does not require, as defendant contends, that a "Ford officer, director, or managing agent believed that the company was compromising consumer safety by reducing costs or expediting production." It will suffice if the evidence, in the light most favorable to the verdict, establishes that corporate policymakers *in fact* compromised consumer safety by reducing costs or expediting production in *willful and conscious disregard* of consumer safety. "[M]alice does not require actual intent to harm .... Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences." (*Angie M. v. Superior Court* (1995) 37 Cal. App. 4th 1217, 1228.)

In the present case, the direct and circumstantial evidence, together with the inferences therefrom, is sufficient to permit a rational trier of fact to clearly and convincingly conclude that defendant acted with malice in its design and introduction into the market of the 1978 Bronco.

B. *Claim of Excessiveness of Punitive Damages*

The trial court denied defendant's motion for a new trial on "all other grounds" stated in defendant's motion, apart from the jury misconduct basis upon which it granted the motion. Among those grounds upon which the motion was

denied was the claim that the amount of punitive damages was excessive. On appeal, this claim has three components: (1) The jury improperly was permitted to consider defendant's overall size and worth in setting the amount of the award; (2) the amount of the award is factually insupportable; and (3) the "unprecedented" size of the award violates defendant's due process right to notice of the penalty that it might incur at the time it acts maliciously.

1. *Review Under California Law*

"The amount of punitive damages is determined in the discretion of the jury. An appellate court will not reverse the jury's determination unless the award as a matter of law is excessive or appears so grossly disproportionate to the relevant factors that it raises a presumption it was the result of passion or prejudice . . . . In reviewing the verdict the appellate court is guided by three main factors: the reprehensibility of the defendant's conduct, the actual harm suffered by the victims, and the wealth of the defendant." (*Rufo v. Simpson* (2001) 86 Cal. App. 4th 573, 623, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 927-928; see also *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal. App. 4th 577, 583.)

The second of the three considerations as set out in *Rufo v. Simpson*, *supra*, 86 Cal. App. 4th at page 623, harm to the victims, is sometimes described instead as "the amount of damages." (See *Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th at p. 417 (conc. opn. of Mosk, J.).) The "amount of damages" in many cases provides an adequate and convenient measure of the harm to the victims. In some instances, however, tort law, for historical reasons, undervalues noneconomic damages and the compensatory damages award is not a reliable measure of the injury to the victims. Wrongful death is among such instances: "In an action by the representative of a decedent's estate, the punitive damages must be compared to the actual harm suffered by the decedent, not the

limited economic damages recoverable by the estate." (*Rufo v. Simpson*, *supra*, 86 Cal. App. 4th at p. 623, fn. 15; see also *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at p. 929.) Therefore, we look to the "actual harm" suffered by the victims as a result of defendant's malicious conduct in our review of the punitive damages award. (*Id.* at p. 928.)

While we clearly must consider the degree of injury to the victims as part of our review of the punitive damages award for excessiveness, neither the Legislature nor the judiciary has established a fixed ratio between the compensatory and punitive damages that provides a standard for determining excessiveness. (See *Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th at p. 417 (conc. opn. of Mosk, J.); *id.* at p. 428 (conc. opn. of Brown, J.).) Rather than focus on any one of the three factors specified by the Supreme Court in *Neal*, our task is to evaluate all three factors in light of the entire record. (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 110.) "[T]he key question before the reviewing court is whether the amount of damages 'exceeds the level necessary to properly punish and deter.'" (*Ibid.*, quoting from *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at p. 928.)

We also note that the trial court, sitting as an independent trier of fact (see *Sierra Club Foundation v. Graham* (1999) 72 Cal. App. 4th 1135, 1160), rejected the claim that the punitive damages were excessive. The trial court's evaluation of the evidence gives added weight to the jury's determination that $290 million is an appropriate award to punish and deter this defendant: The trial court "sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion" in deciding whether to order a new trial, including a new trial

on the excessiveness of punitive damages. (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th at p. 412.)

We turn now to the factors prescribed by the Supreme Court in *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at page 928.

Rather incredibly, defendant contends its conduct—even viewed in the light most favorable to the verdicts—"was at the very lowest end of the reprehensibility spectrum." We disagree.

Involuntary manslaughter is the unlawful killing of a human being, inter alia, "in the commission of a lawful act which might produce death . . . without due caution and circumspection." (Pen. Code, § 192.) Involuntary manslaughter is a felony. As we have concluded above, the evidence supports the jury's conclusion that defendant willfully and consciously ignored the dangers to human life inherent in the 1978 Bronco as designed, resulting in the deaths of three persons. Such corporate conduct can constitute involuntary manslaughter (see *Granite Construction Co. v. Superior Court* (1983) 149 Cal. App. 3d 465) and, when viewed in the context of a mass-produced vehicle sold to the public, certainly is seriously reprehensible conduct.

Further, defendant ignored its own internal safety standards while leaving the Bronco with the appearance of incorporating a roll bar into the vehicle's roof structure. Defendant declined to test the strength of the Bronco's roof before placing the vehicle in production, and when it did test the roof strength in conjunction with the redesign of the Bronco for the 1980 product line, defendant concluded the roof in fact failed to meet its own standards. Defendant modified the roof for the 1980 Bronco, but it did nothing to remedy the structural inadequacies in the tens of thousands of 1978 and 1979 Broncos that were already on the road. In this context—in contrast to the issue of defendant's underlying negligence, not contested on this appeal—it avails defendant

nothing that other auto manufacturers also used fiberglass roofs on contemporaneous fiberglass utility vehicles.

The harm to the victims is obvious and severe. Defendant does not contend otherwise.

The final issue is whether the punitive damages award is excessive in light of defendant's financial condition. There is no doubt that $290 million is a lot of money. It is also true, however, that defendant is a huge company with enormous monetary resources. At the time of trial, defendant had daily after-tax profits of $20 million and its net worth was $25 billion, of which $14 billion was in cash on hand. Defendant earned well over $100 million in profit from the 1978 and 1979 Bronco. As far as the present record shows (see *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal. App. 4th 1645, 1660-1661), defendant had enjoyed the use of that profit for more than two decades without being penalized in any case for punitive damages arising from the design of the 1978-1979 Bronco.

There is no doubt that $290 million would be a huge windfall to the Romo family. (See *College Hospital Inc. v. Superior Court* (1994) 8 Cal. 4th 704, 712.) The windfall to victims of malicious torts, however, is simply a side effect of our common law system for punishing and deterring wrongdoers. The fact that such damages are a windfall is not irrelevant: it was a major consideration in the Supreme Court's decision to place the burden of proof for punitive damages upon the plaintiff. (*Adams v. Murakami, supra*, 54 Cal. 3d at p. 120.) The windfall nature of the damages is not, however, a consideration in determining whether such damages are excessive as a matter of law. (Cf. *Neal v. Farmers Ins. Exchange, supra*, 21 Cal. 3d at p. 929.)

It is empirically impossible, of course, to know exactly the level of punitive damages that would have a sufficient punitive and deterrent effect without unduly stifling innovation and competition in the marketplace. Any determination

of an amount of punitive damages by a jury or by this court on appeal is, in this sense, somewhat arbitrary. The jury and the trial court each concluded $290 million provided sufficient punishment and deterrence. That damages award is 1.2 percent of defendant's net worth and nine days of its profits at the time of trial. Although these amounts are slightly higher than the award approved in *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at page 929, when we consider that defendant had the use of its 1978-1979 Bronco profits of over $100 million for 20 years prior to the verdict, we cannot conclude the level of damages is excessive.

2. *Review Under Federal Constitution*

In the recent case of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 431-433 [121 S. Ct. 1678, 1683], the United States Supreme Court held that a party raising due process challenges to a punitive damages verdict is constitutionally entitled to de novo review by the appellate court. Such review is limited to the constitutional issues raised. Determinations of fact by the jury (and impliedly reaffirmed by the trial court in denying the new trial motion on excessiveness of damages) are accepted on appeal unless not supported by substantial evidence.

This due process limitation, apparently arising from both the excessive fines clause of the Eighth Amendment and from the due process clause of the Fourteenth Amendment (see *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, *supra*, 532 U.S. at p. 434 [121 S. Ct. at p. 1684]), requires a reviewing court to determine whether the damages award is "grossly excessive." (*Ibid.*) "Only when an award can fairly be categorized as 'grossly excessive' in relation to the [state's legitimate interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." (*BMW of North America, Inc. v. Gore*, (1996) 517 U.S. 559, 568 [*BMW*].) In order to avoid such arbitrariness, even when the

state has a strong interest in preventing particular conduct, state law must provide notice not only of "the conduct that will subject [a defendant] to punishment, but also of the severity of the penalty that a State may impose." (*Id.* at p. 574; see also *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, *supra*, 532 U.S. at p. 434 [121 S. Ct. at p. 1684].)

In *BMW*, the Supreme Court noted certain "guideposts" to assist its determination whether the defendant had received adequate notice of the severity of the penalty that might be imposed on it. Those were "the degree of reprehensibility of the [conduct]; the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award; and the difference between [the punitive damages award] and the civil penalties authorized or imposed in comparable cases." (*BMW*, *supra*, 517 U.S. at p. 575.) As noted, however, the ultimate question is whether the award is grossly excessive in relation to the interests the state seeks to protect through the award. (*Id.* at p. 568.)

As we have already discussed, defendant's conduct was grossly reprehensible. While defendant did not intend the death to the victims, the award here cannot be compared to cases "involving a business fraud resulting only in economic harm." (*Rufo v. Simpson*, *supra*, 86 Cal. App. 4th at p. 624.) Further, the malicious conduct involved mass production and marketing of the dangerous vehicle purely for defendant's economic betterment. (See *Grimshaw v. Ford Motor Co.*, *supra*, 119 Cal. App. 3d at pp. 819-820.) Unlike *BMW*, where the defendant's conduct was not even unlawful in all states and involved only economic consequences, the conduct here placed tens of thousands of lives at risk and actually claimed three such lives in the present case. The *BMW* court was able to conclude: "In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature." (*BMW*, *supra*, 517 U.S. at p. 576.) In

the present case, by contrast, the reprehensibility factor weighs heavily against a finding that the punitive damages award is grossly excessive.

There is a great disparity between the compensatory and punitive damages award. While this factor weighs in favor of a finding of excessiveness, the importance of the factor is somewhat reduced, as we have explained above, because wrongful death compensatory damages do not fully reflect the harm to the victims.

Finally, the nature of the conduct involved in the present case makes inapplicable the third *BMW* factor, comparison with civil fines for similar conduct. Such a comparison is appropriate when the conduct to be punished cannot result in imprisonment if committed by an individual, but is inappropriate when the malicious conduct could result in substantial imprisonment if committed by an individual instead of a corporation. (See *BMW*, *supra*, 517 U.S. at pp. 583-584, distinguishing *Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, 22.)[3]

---

[3] Defendant also contends that a California plaintiff seeking a punitive damages award based, in part, on a defendant's financial condition must prove the defendant's profits from California only and in some manner allocate the defendant's net worth to its California operations. In *BMW*, *supra*, 517 U.S. at page 585, the individual state's punitive damages award effectively sought to impose Alabama's unique "regulatory policies on the entire Nation." If the issue in the present case were an automaker's willful disregard of California's unique and stringent emission standards, there might be merit to defendant's contention that the financial condition evidence should target only defendant's California operations. Here, by contrast, the interest California seeks to protect—individual human lives—is neither unique to California nor limited to its own citizens: any 1978 Bronco operated on California highways creates the same risks to its occupants no matter where the vehicle was sold nor where its occupants reside.

Defendant contends that no California case has awarded anywhere near $290 million in punitive damages and, accordingly, defendant lacked notice of "the severity of the penalty that a State may impose," as required by *BMW*. (See *BMW*, *supra*, 517 U.S. at p. 574.) The Penal Code, in language unchanged since its initial adoption in 1872, however, provides clear notice that killing a human being "in the commission of a lawful act which might produce death . . . without due caution and circumspection" is manslaughter. (Pen. Code, § 192, subd. (b).) Defendant has been on notice "for more than a century" that California regards it as necessary to impose penalties related to the wealth of the defendant in order to achieve the goals of punishment and deterrence. (See *College Hospital Inc. v. Superior Court*, *supra*, 8 Cal. 4th 704, 712.) And defendant has been on notice since at least 1971 that a week's profits amounting to about 1 percent of net wealth are not excessive punitive damages. (See *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at p. 929, citing *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal. App. 3d 266, 271.) Taken altogether, these factors provided defendant adequate notice of the potential for the punitive damages awarded in this case.

We note that neither the United States Supreme Court nor any California court has held that a jury's consideration of the size and resources of a defendant invalidates a punitive damages award. Rather, the courts recognize that a defendant's wealth cannot be the sole criterion for the size of a punitive damages award: ability to pay an award cannot justify an *otherwise excessive* punitive damages award. (See *BMW*, *supra*, 517 U.S. at p. 585.)

Here, the punitive damages verdict was not "otherwise excessive"; instead, consideration of the size and net worth of a corporate defendant was necessary if the jury was to appropriately vindicate the state's interest in protecting the lives of its citizens.

DISPOSITION

The order granting defendant's motion for new trial is reversed. In all other respects, the judgment is affirmed. Plaintiffs are awarded costs on appeal.

VARTABEDIAN, Acting P. J.

WE CONCUR:

Buckley, J.

Cornell, J.

APPENDIX B

STANISLAUS COUNTY SUPERIOR COURT,
STATE OF CALIFORNIA

JUAN RAMON ROMO, et al.,
vs
FORD MOTOR COMPANY

NATURE OF HEARING: LAW AND MOTION
CASE NO. 82318
JUDGE: ROGER M. BEAUCHESNE
Bailiff: L. Weaver
Clerk: P. Murray
Reporter: None
Date: Sept. 15, 1999
MODESTO, CA

Appearances:

None

This matter came on calendar on September 10, 1999 upon defendant Ford Motor Company's Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial, and Motion to Tax Costs.

Upon due consideration of the written Points and Authorities submitted by counsel and the oral arguments proffered on September 10, 1999, the Court renders the following decisions on the Motion for Judgment Notwithstanding the Verdict and Motion for a New Trial. There having been insufficient time to hear the arguments on Ford's Motion to

Tax Costs, said motion is continued to October 8, 1999 at 8:30 a.m. in Department 5.

I.

Motion for Judgment Notwithstanding the Verdict

The Court DENIES defendant Ford Motor Company's Motion for Judgment Notwithstanding the Verdict in its entirety.

II.

Motion for New Trial

(A) The COURT GRANTS Ford Motor Company's Motion for a New Trial on the issue of punitive damages; *i.e.*, on both the issue of whether Ford was guilty of malice and the amount of punitive damages, if a subsequent jury finds malice.

(B) The COURT GRANTS Ford Motor Company's Motion for a New Trial on the issue of compensatory damages (economic damages) for the Estates of Ramon Romo and Salustia Romo subject to the condition that the motion for a new trial on this issue is DENIED if plaintiff(s) consent(s) to a reduction to $5,000.00 as to each of the estates.

(C) The COURT DENIES Ford Motor Company's Motion for a New Trial on all other grounds specified in its Notice of Motion for a New Trial.

III.

Specification of Grounds and Reasons for Granting a New Trial On the Issue of Punitive Damages

The COURT grants Ford Motor Company's motion for a New Trial on the issue of malice and punitive damages based upon misconduct of the jury. (CCP section 657(2)). Declarations submitted by both plaintiffs and defendant established that the jurors were exposed to, and injected into the jury room, a television program regarding allegations of defective Ford vehicles. One juror, even if not having seen the pro-

gram, told other jurors of a "60 Minutes II" program which aired on May 19, 1999 and that featured alleged fire problems from rear-end collisions involving older Ford Mustangs in which drop-in fuel tanks were punctured. This juror allegedly told the other jurors that Ford's former president, Lee Ioccoca—who headed Ford while the Bronco was being developed and whose name was mentioned frequently during trial—said on the program that Ford had a policy to defend or settle lawsuits rather than recalling or correcting vehicles. In fact, the Court's review of the exhibit (the videotape) reveals Mr. Ioccoca made no such comment. The 60 Minutes program also featured graphic depictions of the burn injuries suffered by victims of Ford's alleged misconduct.

At least two (2) juror declarations state that the juror who mentioned the 60 Minutes program told the other jurors that the program was evidence of Ford's malice regarding the 1978 Bronco.

Additionally, after repeatedly telling the jurors that they needed to "save the babies", another juror told the jury in great detail of a morbid nightmare she supposedly had the night before in which her child and the other jurors' children were killed by a repeatedly rolling-over Bronco while the Ford attorneys and witnesses armed with guns, mockingly chanted, "Where's the proof, where's the proof?" This same juror allegedly also told her fellow jurors that her dream was an "omen", thereby suggesting that it had some sort of mystical significance regarding how to vote in the case. She allegedly also urged her fellow jurors that they "did not need to follow the law because saving babies was too important." This same juror allegedly stated that what one of the plaintiffs' attorneys said "should be considered as evidence."

A litigant is entitled to a fair trial, not necessarily a perfect trial. A fair trial encompasses a fair deliberative process by the trier of fact—in this case a jury of twelve (12) persons. The Court finds that the counter-declarations submitted by

plaintiffs fail to rebut the presumption of prejudice in this case. Juror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case and a refusal to follow the law. The alleged misconduct occurred on the second day of deliberations. The jury voted 12-0 on the issues of liability and compensatory damages. However, the jury voted 9-3 on the issues of malice and the amount of punitive damages.

Because there was a bare majority on the issues of malice and the amount of punitive damages and because the standard of proof as to malice is so high, the Court finds the deliberative process on these two (2) issues was presumptively infested with passion and prejudice as to render the verdict on punitive damages fundamentally suspect. If not singly, then in combination, the juror misconduct described above was presumptively prejudicial and such presumption has not been rebutted.

Despite admonitions from the Court, in essence, not to consider anything but the facts and the law, and despite other jurors' admonitions not to consider the external evidence and influences discussed above, the jury was being told not to think of the proverbial pink elephant. The damage was presumptively done.

Fairness dictates a new trial on the issues of malice and punitive damages.

IV.

Specification of Grounds and Reasons for Granting Conditional New Trial on the Issue of Compensatory Damages (Economic Damages) for the Estates of Ramon Romo and Salustia Romo

The Court grants a conditional new trial on this issue on the ground that the damages awarded were excessive. (CCP section 657(5)). As a matter of law, the estates of Ramon and Salustia Romo are limited to recovering damages suf-

fered during the period between the accident and death. (CCP section 377.34). Therefore, the awards of $183,988.00 and $295,645.00 in economic damages to the estates have no legal or evidentiary foundation. They are excessive and improper.

Therefore, the Court grants Ford Motor Company's Motion for a New Trial on the issue of compensatory damages (economic damages) for the Estates of Ramon Romo and Salustia Romo subject to the condition that the motion for a new trial on this issue is denied if plaintiff(s) consent(s) to a reduction to $5,000.00 as to each of the estates (CCP section 662.5(b)).

IT IS SO ORDERED.

Date: Sept. 15, 1999

/s/
ROGER M. BEAUCHESNE
Judge of the Superior Court
Stanislaus County

cc: Joseph W. Carcione, Jr., Esq.
Lawrence Drivon, Esq.
Douglas Seitz, Esq.

MINUTE ORDER

APPENDIX C

Court of Appeal, Fifth Appellate District - No. F034241
S108991

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT
FILED
OCT 23 2002
Frederick K. Ohlrieh Clerk
Deputy

JUAN RAMON ROMO et al.,
Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY,
Defendant and Appellant.

Petition for review DENIED.

Kennard, J., Baxter, J., and Brown, J., are of the opinion the petition should be granted.

The requests for an order directing depublication of the opinion are denied.

/s/
Chief Justice

APPENDIX D

FORD'S PROPOSED JURY INSTRUCTION NO. 75

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn			
Refused	X	Judge	

Punitive damages are an extraordinary remedy. They are not favored in the law and should be given only in extreme cases, with caution and within narrow limits.

FORD'S PROPOSED JURY INSTRUCTION NO. 76

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn		_____	
Refused	X	Judge	

You may not award punitive damages merely because you have found by a preponderance of the evidence that the product was defective or that Defendant was negligent. An honest mistake or error of judgment does not constitute malice. Neither does extreme incompetence. Rather, you may award punitive damages only if you find by clear and convincing evidence that Defendant had no arguably legitimate reasons for designing the product as it did. In other words, you may award punitive damages only if you find by clear and convincing evidence that the risks of the product's design so greatly outweigh the benefits that no reasonable person could have concluded that the product was not defective. Thus, you may not award punitive damages if reasonable people can disagree about whether the products was defective.

FORD'S PROPOSED JURY INSTRUCTION NO. 77

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn			
Refused	X	Judge	

You may not award punitive damages merely because you find that Defendant considered cost in designing the product. A responsible manufacturer must consider the costs in designing products that are affordable to the anticipated users of its product.

FORD'S PROPOSED JURY INSTRUCTION NO. 78

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn			
Refused	X	Judge	

In determining the amount of punitive damages, the most important factor to consider is the reprehensibility or blameworthiness of Defendant's conduct. In evaluating the reprehensibility of Defendant's conduct, you must consider, for example (1) the fact that the Ford Bronco met and exceeded Federal Motor Vehicle Safety Standards, (2) the extent to which the product complied with industry custom and practice, (3) the absence of any objective test from which Defendant could determine in advance whether the Bronco was defective under California law, (4) the likelihood that injury would occur, Defendant's awareness, if any of the likelihood of harm, and its motivation; and (5) the duration of Defendant's misconduct, if any, and whether it attempted to conceal such misconduct.

FORD'S PROPOSED JURY INSTRUCTION NO. 79

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn			
Refused	X	Judge	

Punitive damages ordinarily cannot be awarded where the manufacturer has designed its product consistent with industry custom and practice. If you find that the design of this model Bronco complied with industry custom and practice and with government regulations and standards, you should not award punitive damages.

APPENDIX E

TRIAL COURT'S INSTRUCTIONS TO THE JURY REGARDING AMOUNT OF PUNITIVE DAMAGES

. . .

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.

(3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiffs.

. . .

Supreme Court, U.S.
FILED
APR 4 2003
CLERK

No. 02-1097

In The
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The Fifth Appellate District

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The jury in this case found by clear and convincing evidence that Ford consciously disregarded human life in marketing a dangerously defective vehicle – the 1978 Bronco – which caused the deaths of three Californians and serious injuries to three others. The California Court of Appeal, after *de novo* review of the resulting punitive damage award, concluded that the award was not "grossly excessive" because: 1) Ford was guilty of "grossly reprehensible" conduct equivalent to "involuntary manslaughter;" 2) the actual and potential harm of Ford's conduct included three deaths and the potential for thousands of other deaths; and 3) Ford had ample notice under California law that conduct disregarding human life could result in serious punishment, including imprisonment.

The 1978 Ford Bronco

The 1978 Bronco is an unstable sport utility vehicle Ford marketed for American families with a roof that is two-thirds plastic/one-third steel and has no roll bar. Ford knew before selling the 1978 Bronco that its roof would "fail" to protect its occupants in a rollover – just as it did here. Automotive experts called the Bronco a "piece of junk" and the "absolute" "worst" vehicle ever in a rollover.[1] As Ford formally admitted, never in its entire history had Ford built a hardtop vehicle without steel in the vehicle's rearmost roof pillar (the "D" pillar) to protect passengers. The extreme danger of the Bronco was shown by statistics Ford itself compiled for this trial which revealed that once the 1978 Bronco rolls over, it kills more occupants per rollover – *than any other SUV*.[2]

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[1] RT 2748:20-2750:16; 2757:14-2758:13; 3380:22-3382:1; 3524:3-26; 5013:19-5016:3; 5025:9-5028:17; 2669:13-18.

[2] Exhibits 204.5; 229.37; RT 4922:11-4933:14.

Well before marketing the 1978 Bronco, Ford had acquired extensive knowledge of rollover and roof crush hazards from testing, research, and safety engineering evaluations it conducted during the 1960s and 1970s. But in the mid-1970s, when the "large SUV" market suddenly took off, Ford saw it had no "entry" in that market and would have none until 1980. Ford's very top management reactivated and "expedited" a once-shelved "stop gap" 1978 Bronco (to exist but 2 years) knowingly sacrificing roof safety in the rush. Henry Ford II personally cut $9 million from the vehicle's production budget, and despite its own safety engineering "consensus" on roof crush and occupant safety, Ford deleted the "integral" roll bar from the original one-third steel roof design, and omitted steel reinforcement in the plastic rear two-thirds of the roof.

Despite deleting the "integral" roll bar, Ford left a deceptive empty "hump" in the steel part of the roof to make it "appear" as if a "roll over bar" were inside. Ford then advertised the vehicle for "family" use, promoting it as "Ford Tough."

A Ford *post*-production test on the 1978 Bronco showed the "roof crush problem," but Ford only addressed the "problem" in the planned, tested and unrushed 1980 Bronco by putting steel in the plastic roof's "D" pillar, thereby cutting rollover deaths by 60%. Ford did nothing about the hazards it knew existed in the 1978 Bronco.

The Accident

In the summer of 1992, Ramon Romo bought a 1978 Ford Bronco because he thought it was "a strong, safe car" that was "ideal for the family to ride in." About a year later, on June 20, 1993, Juan Romo, Ramon's eldest son, was driving the 1978 Bronco just south of Modesto, California, on a straight interstate freeway. Juan was traveling the speed limit. The entire family was in the car: Juan's father, Ramon, was in the front passenger seat; Juan's mother, Salustia, and his brother, Ramiro, were in the backseat; and Juan's younger sisters, Evangelina and Maria, were sleeping in the rear of the vehicle.

Juan had been driving for a couple of hours when the family's Bronco approached a slow-moving truck which unexpectedly moved into the Romos' lane. Juan avoided a collision, but because of the Bronco's lack of stability (made worse merely by the presence of multiple occupants), the Bronco swerved across the roadway, and at less than 50 miles per hour started to roll. As the Bronco rolled (2 and ½ times), the roof's two-thirds rear plastic section broke off completely at the roof pillars and invaded the occupant compartment, and the front steel portion flattened to the dashboard.[3]

When the plastic portion of the roof (weighing more than 100 pounds) broke off, it inflicted massive head trauma to Juan's mother and his brother as they sat seat-belted upright in the rear seat. When the front part of the roof flattened, it crushed Juan's father's head as he sat seat-belted upright in the front seat. All three were properly seat-belted. All three died at the scene.

Expert testimony showed that if Ford had put steel reinforcement in the roof (as it later did in the 1980 model Bronco) to maintain "adequate survival space" and to keep the plastic section of the roof from breaking off, the three seat-belted decedents would have "walked away" from this accident.[4]

Juan survived only because as the Bronco rolled, he fell to his side below the crushing roof. Evangelina and Maria survived because they were lying asleep below the breaking rear plastic roof. Juan, Eva, and Maria not only suffered their own injuries, they witnessed their parents' and brother's gruesome deaths.

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[3] A photograph of the Bronco after the accident is in the Appendix.

[4] RT 3633:14-25; 3671:28-3672:10; 3615:11-3616:4.

The Trial

The trial lasted four months. Before trial, Ford declined to exercise its statutory right to a trial "bifurcated" into liability and punitive damage phases. Instead, Ford chose a single-phase trial requiring plaintiffs to prove a *prima facie* case of "malice" before presenting any evidence of Ford's "financial condition." *See* Cal. Civ. Code, § 3295(a).

Also, Ford filed a motion *in limine* to exclude evidence of its "total net worth." CT 177-186. That motion was denied. Contrary to Ford's representation, Cert. Pet., at 3, n. 1, that motion only concerned Ford's "net worth" – nothing else. *Id.* Ford emphasized that the motion did *not* seek to exclude evidence of "profits" from the 1978-79 Bronco when Ford told the trial judge, "[n]othing was ever mentioned" in the *in limine* motion about "profit" relating to the vehicle. RT 5648:27-5649-18.

Evidence of Ford's "malice" showed that before marketing the Bronco:

- Ford knew that hundreds of thousands of rollovers occur each year causing thousands of deaths.
- Ford knew that in those rollovers weak roofs would "penalize" (kill) seat-belted passengers (who remain upright).
- Ford knew from rollover tests and "drop" tests that strong roofs and roll bars preserve occupant space and protect passengers in rollover accidents.
- Ford knew that utility vehicles in particular required strong roofs and "roll bars" to protect occupants because those vehicles rolled over more than other passenger vehicles.
- Ford knew that the 1978 Bronco with its high center of gravity (made higher with occupants) would roll over more than other passenger vehicles.

Yet, despite such knowledge, Ford provided *no rollover protection for occupants in this vehicle.* Instead, disregarding safety:

- Ford violated its own internal engineering "consensus" that plastic should not be used as an occupant enclosure by using unreinforced plastic for a roof with no steel in the Bronco's "D" pillar, saving $10 to $12 per vehicle.
- Ford violated another internal engineering "consensus" that SUVs needed roll bars to protect occupants from rollover injuries and deaths by "deleting" the steel "integral roll bar" in the Bronco's "B" pillar.
- Ford left a deceptive "hump" in the roof that was designed to enclose the "integral roll bar" giving the false "appearance" that a roll bar was inside.
- Ford performed no pre-production roof crush tests and no rollover stability tests for the 1978 Bronco.
- Ford failed to make the Bronco safe while "rushing" it to market to obtain market share.
- Ford knowingly failed to make the Bronco safe while Henry Ford II and Lee Iacocca implemented a corporate policy of "misleading" the government about rollover and roof crush safety hazards in order to avoid federal safety regulations aimed at saving lives.

That Ford knew the Bronco would cause deaths was also made clear by the admissions at trial of Al Darold, Ford's designated corporate representative, that Ford knew the 1978 Bronco's "plastic roof was not designed to witnstand rollover forces," and Ford did not expect this plastic roof top to "survive a rollover accident." RT 6366:3-6367:28; 6578:25-6579:13.

During trial, plaintiffs offered a Ford document into evidence showing total 1978-79 Bronco sales and profits. Exhibit 133.10. When asked if it objected to the evidence, Ford replied: "No objection, Your Honor." RT 5395:19-27. When submitting jury instructions, Ford requested no instruction limiting or excluding evidence of "out-of-state" conduct, sales, or profits.

After five days of deliberations, the jury awarded $6,226,793 in compensatory damages and $290 million in punitive damages. The jury allocated 78% fault to Ford, 12% to the driver of the second vehicle, and 10% to

plaintiff Juan Romo. Judgment for $294,935,709.10 was entered against Ford.

In post-trial motions, Ford challenged the "malice" finding and the amount of the award, but claimed no error based on the admission of Bronco sales or "profits evidence," or plaintiffs' counsel's use of Bronco profits evidence in closing argument. A new trial motion was granted based on alleged juror misconduct but was denied on all other grounds.[5]

The Appeal

After reviewing the entire record, the Court of Appeal rejected Ford's challenge to the jury's "malice" finding, concluding that the evidence was sufficient to permit the jury to "clearly and convincingly conclude" that Ford "acted with malice" and that it was "frivolous" for Ford to contend that its conduct was not sufficiently "vile" or "loathsome" to support the punitive damage award. *Romo v. Ford Motor Co.*, 99 Cal.App.4th 1115, 1146 (2002).

The Court of Appeal then exercised *de novo* review of the punitive damage award as required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). The Court thoroughly examined the record and found Ford's misconduct comparable to "involuntary manslaughter" and "grossly reprehensible." 99 Cal.App.4th

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[5] Ford tries to tarnish the verdict by repeating allegations of jury misconduct. Cert. Pet., at 5-6. But the Court of Appeal reversed the trial court's new trial order because "the record provides no basis to reject the normal presumption the jury followed the instructions." 99 Cal.App.4th at 1133. The Court said: "Despite defendant's consistent attempts to portray this as a case of jurors run amok, the misconduct in the present case does not begin to approach [misconduct required for reversal]." *Id.* at 1137. Moreover, Ford asserts no federal constitutional issues and does not seek certiorari based on its claims of jury misconduct. Indeed, the juror misconduct issue was entirely a question of state law and the Court of Appeal resolved this issue by finding no improprieties.

at 1148, 1150-1151. The Court then compared the "ratio" of the "actual harm" suffered by the Romos (and the compensability of that harm) to the punitive damage award. *Id.* at 1147-1148. On comparable penalties, the Court found that California provided ample "notice" that conduct, like that found here, could result in a substantial civil penalty or "imprisonment." *Id.* at 1152. The Court upheld the award under the United States Constitution and California law.

Contrary to Ford's representations, Cert. Pet., at 2, 3, 7 & 8, the Court of Appeal did not "reject" or even address a Ford challenge to the admission or use of "total" "national" 1978-79 Bronco profits because Ford *waived* the issue in the trial court and never pressed it in the Court of Appeal.

The California Supreme Court denied Ford's petition for review.

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS UNJUSTIFIED BECAUSE THE COURT OF APPEAL PROPERLY ENGAGED IN *DE NOVO* REVIEW IN CONCLUDING THAT THE PUNITIVE DAMAGE AWARD WAS NOT GROSSLY EXCESSIVE

In *Cooper Industries, Inc.*, this Court held that "courts of appeals should apply [a] *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damage awards." 532 U.S. at 436. The California Court of Appeal expressly applied this decision and engaged in exactly the *de novo* review this Court required. 99 Cal.App.4th at 1149. The Court carefully examined the record and followed the test prescribed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), in concluding that the punitive damage award was constitutional.

First, the Court of Appeal found that "the defendant's conduct was grossly reprehensible." 99 Cal.App.4th at 1150. "Unlike BMW, where the defendant's conduct was

not even unlawful in all states and involved only economic consequences, the conduct here placed tens of thousands of lives at risk and actually claimed three such lives in the present case." *Id.* at 1150-1151. And, unlike any other case decided by this Court, this case has "the aggravating factors associated with particularly reprehensible conduct" which risked lives and caused deaths. *Id.* at 1151. Thus, the Court of Appeal properly concluded that "[i]n the present case, . . . the reprehensibility factor weighs heavily against a finding that the punitive damages award is grossly excessive." *Id.* at 1151.

Second, the Court of Appeal noted "a great disparity" between the compensatory and the punitive damages award. But the Court found that when compared to the "obvious and severe" actual harm – multiple deaths, the ratio between the harm and the award was not constitutionally excessive because under California law, the "wrongful death compensatory damages do not fully reflect the harm to the victims." *Id.* at 1151.

Third, the Court of Appeal evaluated comparable civil and criminal penalties. *Id.* at 1151-52. The Court looked to criminal penalties and not just civil fines, because the Court found that Ford had engaged in conduct amounting to "involuntary manslaughter." *Id.* at 1148. "Such a comparison [only to civil fines] is appropriate when the conduct to be punished cannot result in imprisonment if committed by an individual, but is inappropriate when the malicious conduct could result in substantial imprisonment if committed by an individual instead of a corporation." *Id.* at 1151. Thus, the Court of Appeal explicitly engaged in *de novo* review and concluded that the punitive damage award was not grossly excessive.

Ford wrongly argues the Court of Appeal gave "conclusive weight" to the jury's fact-finding in conducting its *de novo* review. Cert. Pet., at 26-30. But the Court appropriately applied well-settled California law requiring that a jury's fact-finding must be upheld if supported by substantial evidence. 99 Cal.App.4th at 1137. The Court then properly assessed *de novo* the constitutional

implications of those underlying facts under each *BMW* guidepost. *Id.* at 1150-52.

Ford's argument confuses two distinct questions: 1) What is the appropriate appellate review of the jury's fact-finding; and 2) what is the appropriate appellate review of the determination of whether a punitive damage award is unconstitutionally excessive? Under *Cooper Industries,* the latter is a standard of *de novo* review, but the former is entirely a matter of state law and deference to the jury is appropriate. This Court stated in *Cooper Industries*: "Although the jury's application of [punitive damage] factors may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing punitive damages award, to disregard such jury findings." 532 U.S. at 440 n. 12. And, "[w]hile we have determined that the Court of Appeals must review the application of the *Gore* test *de novo*, it of course remains true that the Court of Appeals should defer to District Court's findings of fact unless they are clearly erroneous." 532 U.S. at 440 n. 14; *see also Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1150 (9th Cir. 2002) ("degree of reprehensibility" ultimately involves a legal conclusion, but "we must accept the underlying facts as found by the jury.") Here, the California Court of Appeal correctly applied the appropriate "constitutional standard to the facts of [this] particular case." *Cooper Industries*, 532 U.S. at 435.

Ford's argument also incorrectly assumes that the standard of appellate review of a state court jury's fact-finding is governed by federal constitutional law. But the Seventh Amendment, which governs the relationship of courts of appeals and juries in federal court, has never been applied to the states. *See* e.g., *Minneapolis & St. Louis R.R. Co. v. Bombolis,* 241 U.S. 211 (1916). *Cooper Industries* prescribes *de novo* review of whether the amount of punitive damages is grossly excessive and a violation of due process, but that decision does not, and cannot prescribe the appropriate standard for appellate review of a jury's fact-finding. Review of jury fact-finding

is not an issue of federal constitutional law; it is entirely a matter of state law and differing approaches are permissible and an inevitable part of "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971). In fact, the Court in following California law, used a more exacting "substantial evidence" standard for reviewing the jury's fact-findings than this Court has prescribed under the Seventh Amendment for federal juries.

Ford also wrongly argues that *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), hold that a court of appeals must independently review findings of fact. But these decisions said that the absence of appellate review of punitive damage awards violated due process. *Exxon Valdez*, 270 F.3d at 1239; and *see Honda v. Oberg*, 512 U.S. at 429. These decisions do not hold that there should be *de novo* review of a jury's fact-finding.

Ford is incorrect in its contention that California has provided no "meaningful guidance" to juries, Cert. Pet., at 29, because California law long has been virtually identical to the *BMW* guideposts. Moreover, this Court has provided the clear guidance as to the Constitution's requirements in *BMW* and *Cooper Industries* which were followed in this case.

The key error in Ford's argument on the standard for appellate review of the jury's fact finding – and the key flaw throughout its Petition for Certiorari – is its failure to give any deference to the jury's determinations. Ford's approach would require not only that appellate courts engage in *de novo* review of whether a punitive damage award is grossly excessive, but also essentially a new *de novo* standard of review of the facts. Deference to the jury would be eliminated and the ability of states to define the role for juries in their legal systems would be negated. Every punitive damage case in every court in the country would end up being micromanaged by this Court as defendants will always challenge jury fact-finding. Nothing in *Cooper Industries*, or any decision of this Court, has ever suggested such an approach.

II. BECAUSE THE COURT OF APPEAL APPLIED THE TEST PRESCRIBED BY THIS COURT, AND SINCE THE DAMAGES AWARDED IN THIS CASE ARE PERMISSIBLE UNDER THIS TEST, THERE IS NO BASIS FOR A GRANT OF CERTIORARI

Contrary to Ford's arguments, the Court of Appeal appropriately determined that the award was not "grossly excessive" under each of the "guideposts" identified in *BMW*, including a *de novo* assessment of: 1) the "degree of reprehensibility" of the conduct; 2) the "harm or potential harm suffered" and the award; and 3) comparable "civil or criminal penalties." 517 U.S. at 574-83.

A. The Court of Appeal Appropriately Found That Ford's Conduct Was "Grossly Reprehensible"

In *BMW*, this Court described the "degree of reprehensibility" as "[p]erhaps the most important indicium" of excessiveness. 517 U.S. at 575. This is because exemplary damages should reflect "the enormity of [the defendant's] offense." *Id.*

After a lengthy evaluation of the record, the Court of Appeal on *de novo* review unanimously concluded that the "reprehensibility factor weighs heavily against" a finding that the award was "grossly excessive," because unlike *BMW*, Ford's conduct here *included* "aggravating factors" associated with "particularly reprehensible conduct," evincing "indifference to or reckless disregard for the health and safety of others." *Romo,* 99 Cal.App.4th at 1150-1151; and *BMW*, 517 U.S. at 576. The Court found Ford had mass marketed this "dangerous vehicle purely for [its] economic betterment," placing "tens of thousands of lives at risk" and actually claiming "three such lives." 99 Cal.App.4th at 1151.

Also, the Court flatly "disagree[d]" with Ford's contention that its conduct "'was at the very lowest end of the reprehensibility spectrum,'" finding that Ford

"willfully and consciously ignored the dangers to human life inherent in the 1978 Ford Bronco as designed, resulting in the deaths of three persons." *Id.* at 1148. The Court found that such corporate misconduct can constitute "involuntary manslaughter" and that "viewed in the context of a mass-produced vehicle sold to the public, certainly is seriously reprehensible conduct." *Id.*

Despite these findings, Ford argues that the Court of Appeal did not properly find Ford's conduct to be "grossly reprehensible" because Ford says: 1) it acted "reasonably" compared to other manufacturers; 2) it complied with Federal Motor Vehicle Safety Standards (FMVSS); 3) it did a "standard menu" of tests on the Bronco; 4) "paid experts" merely "disagreed" whether Ford was malicious; and 5) there had been no other Bronco lawsuits. Cert. Pet., at 6, 10-14. But these claims were made to the jury, which rejected them, as did the Court of Appeal. 99 Cal.App.4th at 1143, 1148, 1150.

The task for this Court, of course, is not to review the record and decide the facts for itself. Instead, the question is whether the Court of Appeal engaged in an appropriate review of the record in determining whether the award was "grossly excessive" relative to the degree of reprehensibility of Ford's conduct. *Cooper Industries,* 532 U.S. at 440. The Court of Appeal engaged in that *de novo* review. Further, the Court of Appeal also thoroughly examined the "entire record" in rejecting Ford's claims that its conduct was reasonable. 99 Cal.App.4th at 1143-47.

First, the Court rejected the argument that the 1978 Bronco was "comparable" to other SUV designs of that era, Cert. Pet., at 3, 10, because the record showed that Ford omitted roll bars from the Bronco even though it knew the 1976 Chevy Blazer, the vehicle Ford basically copied in creating the Bronco, had roll bars for both the steel "B"

pillars and plastic "D" pillars.[6] Thus, the Court found Ford's "decision to put the unreinforced fiberglass roof was despicable" because defendant knew "the competitor's removable fiberglass roof did contain metal reinforcement," *Id.* at 1145, and that because of Ford's knowledge of the Bronco's rollover and roof crush hazards it "avails defendant nothing that other auto manufacturers also used fiberglass roofs on contemporaneous fiberglass utility vehicles." *Id.* at 1148.

Second, the Court of Appeal rejected Ford's alleged compliance with federal safety standards in effect "years after the design and production of the 1978 Bronco" because it "did not reflect the corporate state of mind prevailing at the time in question." *Id.* at 1143-1144. Ford knew the Bronco's roof would fail *before* it sold the vehicle.[7]

Ford also wrongly asserts that compliance with federal regulations precludes a finding of "malice." Cert. Pet., at 13. Courts are unanimous that it does not. *See Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059, n. 21 (11th Cir. 1994) (declining to hold that compliance with federal regulations "precludes a finding of wantonness"); and *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656-57, n. 6 (5th Cir. 1981) (alleged compliance with inapplicable

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[6] RT 2289:21-2291:15; Exhibit 230.82; RT 2500:28-2503:26; 2519:19-2521:2; 7046:26-7048:10; Exhibit 302.564, pp. 3-1-1, 3-2-1, 3-3-1.

[7] Further, Ford's alleged "compliance" was meaningless because no federal roof strength regulations applied to the Bronco in 1978 and the federal roof crush test does not test the plastic roof's "real world" vulnerability to *breaking* on impact. Exhibit 1056; RT 2211:9-2214:17; 2217:2-22; 2403:22-2404:1; 3525:23-3526:11. Also, Ford did not "comply" in good faith with federal standards because before producing the Bronco, Ford fraudulently "misled" the National Highway Traffic Safety Administration (NHTSA) about rollover and roof crush hazards to avoid the enactment of those safety regulations. RT 3247:16-3252:17; RT 3258:21-3259:7; 3386:2-3387:1; Exhibit 302.241, p. 2; RT 3519:12-3521:11. Moreover, Ford did not even comply with its *own* internal engineering "consensus" against using plastic for occupant enclosures, and in favor of requiring roll bars on utility vehicles.

federal safety standards did not bar punitive damages). Similarly, the cases cited by Ford on "industry custom" hold that such evidence is relevant but does not bar a malice finding. Cert. Pet., at 14.

Third, Ford did no pre-production roof crush or "stability" tests.[8]

Fourth, Ford's experts may have "disagreed" as to whether Ford was guilty of malice, but based on largely uncontradicted evidence (including in-court admissions of Ford's representative, Al Darold, and its ex-Vice President, and its own documents), the jury found malice, and the Court of Appeal affirmed. Cases cited by Ford on this issue, Cert. Pet., at 12-13, do not apply because the evidence in those cases was legally insufficient to sustain a malice finding.

Fifth, plaintiffs presented no evidence of other Bronco lawsuits by choice, not because none existed. Ford's *pre*-production malice is unaffected by this fact.

Thus, the Court of Appeal did not hold that "mere awareness" of a product's "potential risk of injury (no matter how small) suffices to establish gross reprehensibility," notwithstanding "compliance" with government and industry standards, and Ford's "good faith belief," Cert. Pet., at 8, but recognized that Ford intentionally marketed a product against its own internal engineers' "consensus," without

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[8] Ford says that it ran its "entire 'standard menu' of tests" on the Bronco. Cert. Pet., at 27, n. 13. But the evidence showed that Ford performed *no pre-production roof crush tests* at all (RT 2324:4-2325:17; 2401:26-2402:1; 2796:8-2797:23; 5905:24-5909:22; 6301:12-24; 6302:18-6303:11; 6441:24-6442:8), and only performed routine driving tests and *none of the tests* Ford told NHTSA in 1973 would properly test vehicle stability (Exhibit 301.898, Appendix C, p. 5; RT 2324:4-15; 5906:2-5907:7; 6294:5-6301:24).

Also, Ford's failure to test was unreasonable because Chevrolet had conducted pre-production rollover and roof crush tests on its 1976 Blazer (RT 2205:27-2208:13; 2228:27-2229:25), and these kinds of tests "should have been done" on the Bronco (RT 3376:8-3377:3).

rollover safety testing, and with design defects that it knew would kill.

Ford also contends that this Court should grant review to protect manufacturers from punitive damage awards. Cert. Pet., at 14. Ford argues: "To say, as the court did here, that a manufacturer, to make a profit, marketed a product that 'could kill people,' simply begs the question of reprehensibility." *Id.* at 14. But once more, this case is not about a product that "could kill people"; it is about three people who died in a product that Ford *knew* could kill people. As the Court of Appeal stated:

> "[W]e think it obvious that putting on the market a motor vehicle with a known propensity to roll over and, while giving the vehicle the appearance of sturdiness, consciously deciding not to provide adequate crash protection to properly belted passengers (in the words of a corporate memo introduced into evidence, 'penalizing' passengers for wearing a seatbelt) constitutes despicable conduct. Such conduct could kill people." 99 Cal.App.4th at 1141.

Ford also says that without review, a *per se* reprehensibility rule will subject every manufacturer "to huge punitive damage awards every time a jury, in hindsight, finds a product to be defective." Cert. Pet., at 10, 14. But the jury not only found this product defective, they found Ford guilty of "malice" which the Court of Appeal found "grossly reprehensible." There is no basis for Ford's apocalyptic prediction that without this Court's review every manufacturer would face huge punitive damage verdicts whenever there is a defective product.

B. The Court of Appeal Appropriately Found that the Ratio Between the Punitive and Compensatory Damages Did Not Show that the Award Was Excessive

Ford argues that the ratio "is unconstitutional on its face." Cert. Pet., at 16. But this Court has maintained that there is no *per se* or facial unconstitutionality, consistently

rejecting a constitutional "bright line," marked by a "simple mathematical formula." *BMW*, 517 U.S. at 582; and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

In fact, the 50 to 1 ratio here is less than that already approved in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).[9] In *TXO*, this Court upheld a punitive damage award that was "526 times greater than the actual damages awarded by the jury," 509 U.S. at 453, concluding "we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow." *Id.* at 462. This Court stressed that in appraising the reasonableness of the ratio, it is appropriate to consider the magnitude of "the *potential harm* that the defendant's conduct" may cause to the plaintiff and "other victims." *Id.* at 460. Here, the Court of Appeal recognized that Ford's conduct "placed tens of thousands of lives at risk" and actually claimed "three such lives." 99 Cal.App.4th at 1151. Indeed, Ford's conduct could have killed all six in the Romo family. Such misconduct supports a higher ratio.

Further, this Court has stated that the "ratio" guidepost requires an assessment of the punitive damage award's ratio to the "harm" inflicted on the plaintiff. *BMW*, 517 U.S. at 580. And "[h]igher ratios" may be justified where "a particularly egregious act has resulted in only a small amount of economic damages," or where "the monetary value of noneconomic harm might have been difficult to determine." 517 U.S. at 582.

Here, the Court of Appeal not only found Ford guilty of particularly "egregious" conduct, the Court recognized

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[9] Ford says the ratio is 63 to 1. Cert. Pet., at 8, 16. But in the courts below Ford stated the ratio is "48 to 1," and "less than 50 to 1." Plaintiffs agree with Ford's earlier ratio assessment based on a comparison of the $290 million punitive damage award to the total compensatory damages of $5,757,160.00 (after remittitur) awarded by the jury (a 50.4 to 1 ratio). CT 1481-1482; 3435-3437. Regardless, plaintiffs believe the ratio analysis is unaffected by the use of either the higher or lower ratio number.

that California law "undervalues "non-economic" harm in death cases by permitting victims' estates to recover economic damages only. *Id.* at 1147. Thus, the Court found the purely mathematical ratio was not excessive because "wrongful death compensatory damages do not fully reflect the harm to the victims." *Id.*[10]

In contrast, this Court has found lower ratios appropriate where "none of the aggravating factors associated with particularly reprehensible conduct are present," and the harm is "purely economic in nature." *BMW*, 571 U.S. at 576. Cases cited by Ford follow this reasoning. Cert. Pet., at 16. *See FDIC v. Hamilton*, 122 F.3d 854, 861-62 (10th Cir. 1997) ("an economic injury case," where the reprehensibility factor "militates against punitive damages"); and *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-44 (5th Cir. 1996) ("economic damage" case where the conduct was not reprehensible).

Also, in the years since *BMW* was decided, there are many federal appellate decisions approving punitive damages with higher ratios. *See* e.g., *United States v. Big Enterprises*, 184 F.3d 924 (8th Cir. 1999) (100:1 ratio); *Johansen v. Combustion Engineering*, 170 F.3d 1320 (11th Cir. 1999) (90:1 ratio); *Deters v. Equifax Credit Information Services*, 202 F.3d 1262, 1272 (10th Cir. 2000) (59:1 ratio). This belies Ford's claim that there is a bright line rule of facial unconstitutionality for punitive damage awards and that the award here breaches that purported rule.

C. The Court of Appeal Appropriately Considered Other Sanctions for Ford's Conduct

Contrary to Ford's argument, the Court of Appeal did not "reject" the comparable penalties guidepost but appropriately concluded that Ford had fair notice of the

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[10] Here, the "actual harm" done included extreme harm – death, but the compensatory awards, pursuant to California law for that harm were nominal: father – $5,000; mother – $5,000; and brother – $0.

potential award based on comparable civil and criminal penalties. 99 Cal.App.4th at 1151-1152.

In *BMW*, this Court required that the punitive damage award be compared to either "the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. The Court of Appeal considered both.

First, the Court of Appeal recognized the obvious: "comparison with civil fines . . . is inappropriate when the malicious conduct could result in imprisonment if committed by an individual instead of a corporation." 99 Cal.App.4th at 1151. That conclusion is consistent with this Court's decision in *Haslip* upholding a punitive damage "much in excess of the fine" that could have been imposed, because "[i]mprisonment" could have been required "in the criminal context." 499 U.S. at 23.

As Ford itself recognizes, many courts have come to this same common sense conclusion: comparison cannot be restricted to civil fines in a case where the conduct rises to the level of criminal culpability. The Tenth Circuit stated: "[Although] a punitive damage award [may be] exceptional when compared only to the applicable fines, the authorization of imprisonment in the criminal context can justify a higher award." *Bielicki v. Terminix International Co.*, 225 F.3d 1159, 1166 (10th Cir. 2000). None of the cases cited by Ford hold to the contrary. Cert. Pet., at 19. In fact, in *In re Exxon Valdez*, 236 F.Supp.2d 1043 (D. Alaska 2002), cited by Ford, the District Court found that "provision for imprisonment is a recognized legislative signal of heightened seriousness of the offense, and therefore, for purposes of the *BMW* analysis, justifies a punitive damages award "'much in excess of the fine that could be imposed.'" *Id.* at 1067. There is no conflict among the circuits or state courts on this issue.

Second, the Court of Appeal also considered the civil penalties that "could" be imposed, finding that Ford has been on "notice" that California has "for more than a century" imposed civil penalties related to the defendant's wealth, and that "since at least 1971" California has

upheld punitive damage awards amounting to a week's "profits," and "1 percent of net wealth." 99 Cal.App.4th at 1152. The Court found that these well-established penalty parameters provided Ford with "adequate notice of the potential for the punitive damages awarded in this case." *Id.*

D. The Court of Appeal's Consideration of Ford's Overall Wealth In Determining the Punitive Damage Award is Consistent with the Decisions of this Court and Every Court

Ford wrongly argues the Court of Appeal used Ford's overall wealth to "disregard" and "trump the *BMW* guideposts." Cert. Pet., at 19. The Court applied *BMW*'s guideposts, and also appropriately considered Ford's "financial condition" as an additional factor in determining whether the award was excessive.

In *Haslip*, this Court found state standards which include consideration of a defendant's "financial position," impose "sufficiently definite and meaningful constraint" on a state's fact finders. 499 U.S. at 22. In *TXO*, this Court noted under "well-settled law" the defendant's "impressive net worth" may be considered. 509 U.S. at 462, n. 28. Then in *BMW*, this Court again accepted state guidelines requiring juries to consider the "financial position" of the defendant in awarding punitive damages. 517 U.S. at 566.

Courts take into account the defendant's worth because "an amount sufficient to punish or deter one individual may be trivial to another." *Zazu Designs v. L'Oreal SA*, 979 F.2d 499, 508 (7th Cir. 1992) (citation omitted). And, "wealth must remain relevant, because $50,000 may be awesome punishment for an impecunious individual defendant but wholly insufficient to influence the behavior of a prosperous corporation." *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641 (10th Cir. 1996). Courts throughout the country have

upheld jury consideration of a defendant's wealth in imposing punitive damages.[11] Indeed, as the Court of Appeal recognized, "wealth" has been considered in assessing punitive damages in California for well over "a century." *Id.* at 1152.

Hence, the Court of Appeal appropriately considered Ford's wealth in determining that the award was not excessive as required by California law. *Id.* at 1149. And, citing *BMW*, the Court explicitly recognized that wealth alone could not justify the award:

> [T]he courts recognize that a defendant's wealth cannot be the sole criterion for the size of a punitive damage award: ability to pay cannot justify an *otherwise excessive* punitive damage award. *Romo,* 99 Cal.App.4th at 1152 (original emphasis).

Ford also argues that the Court of Appeal's ruling "demolishes" due process by "automatically" deeming "large corporations to have had 'fair notice' of virtually *any* monetary punishment" leaving wealthy defendants "bereft" of constitutional protection. Cert. Pet., at 21. Ford again mischaracterizes the Court's decision and its import. The Court did not "trump" *BMW*'s due process guidelines. It only considered Ford's financial condition in addition to thoroughly analyzing the award *de novo* in concluding the award was not constitutionally "excessive." Ford's rights were protected.

Ford also contends that "the relevant financial information, if any, is the monetary 'gain,' attributable to the defendant's wrongful conduct." Cert. Pet., at 22. Although this Court in *Haslip* has approved consideration of *both* "financial position," and the "profitability to the

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[11] *See* e.g., *Swinton v. Potomac Corp.,* 270 F.3d 794, 818 (9th Cir. 2001); *Kemezy v. Peters*, 79 F.3d 33 (7th Cir. 1996); *Black v. Iovino,* 219 Ill.App.3d 378, 394, 580 N.E.2d 139, 150 (1991); *Kirkbride v. Lisbon Contractors, Inc.,* 521 Pa. 97, 555 A.2d 800, 803 (1989); *Alaskan Village v. Smalley,* 720 P.2d 945 (Alaska 1986).

defendant of the wrongful conduct," there is no authority holding that either factor should be used to the exclusion of the other. 499 U.S. at 22. In fact, in *Haslip* and *TXO*, this Court upheld punitive damage awards that were vastly greater than the profits generated by the misconduct at issue.[12]

III. BECAUSE DAMAGES WERE AWARDED BASED ON UNLAWFUL CONDUCT IN CALIFORNIA, THERE IS NO ISSUE WARRANTING A GRANT OF CERTIORARI CONCERNING THE CONSTITUTIONAL LIMITS ON A STATE'S POWER

Ford, in its second Question Presented, argues that the Court of Appeal "in conflict with *BMW* and *White v. Ford*" impermissibly allowed the jury verdict to "deprive petitioner of its total nationwide profits from sales of the product at issue." This argument is flawed because: 1) Ford waived its right to claim "extraterritorial" error based on "nationwide profits" on the Bronco; 2) no "out-of-state" conduct was punished here; and 3) the jury's

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[12] Ford also claims that its wrongful "gain" was $10 or $12 per vehicle. But this defective vehicle should *never have been on the road at all*. Ford had planned to wait until 1980 to introduce the "Big Bronco," but "reactivated" and "rushed" the "shelved" 1978-79 Bronco to market without rollover protection to capture lucrative market share. Ford's wrongful "gain" includes the entire economic benefit Ford obtained from marketing this vehicle when it did. Also, a new rule limiting financial condition to only one factor, i.e., remedial per unit cost, could negate the effectiveness of punitive damages to punish and deter.

Further, Ford's unprecedented proposal makes no sense because limiting punitive damages based on the cost of remedial measures alone could provide an inability to punish effective low-cost safety improvements. Moreover, it could punish efforts applying more costly, perhaps innovative, per unit improvements harshly. When safety *is* involved, rather than mere economic gain, such a myopic analysis would have limited value.

consideration of Bronco "profits" presents no constitutional issue.

A. Ford waived its right to challenge the admission, use, and jury consideration of profits on the 1978-79 Bronco.

This Court has no jurisdiction to review the "profits" issue because the Court of Appeal did not address or pass upon a constitutional challenge by Ford to the admission or use of evidence of 1978-79 Bronco profits. Ford waived any challenge on this issue in the trial court, and never pressed it in the Court of Appeal.

In order to invoke this Court's jurisdiction, Ford must show that a federal question was either raised or decided in the state court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). Ford must show that they presented their federal claim with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. 83, 88-89 (1997). Whether a federal question was raised, is a matter of state procedural law. *Webb v. Webb*, 451 U.S. 493 (1981).

At trial, under California law, Ford waived any constitutional challenge to the admission and use of 1978-79 Bronco profits evidence because:

- Ford deliberately chose not to make a motion *in limine* to exclude or limit consideration of the evidence (explicitly telling the court the motion did not include Bronco "profit." RT 5648:27-5649:18).
- Ford acquiesced to the admission of the evidence.[13]
- Ford made no objection to counsel's closing argument referring to the evidence.[14]

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[13] Cal. Evid. Code, § 353; *People v. McPeters*, 2 Cal.4th 1148, 1188 (1992); *People v. Farnam*, 28 Cal.4th 107, 185 (2002).

[14] *People v. Bolden*, 29 Cal.4th 515, 526 (2002); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 797-798 (1981); *Brokopp v. Ford Motor Co.*, 71 Cal.App.3d 841, 860 (1977).

- Ford chose not to request a jury instruction limiting the jury's consideration or use of the evidence, even though it had done so in other prior litigation.[15]

Here, unlike the defendants in *BMW v. Gore* and *Campbell v. State Farm*, 2001 WL 1246676 (Utah 2001), *cert. granted*, 70 U.S.L.W. 3580 (2002) (No. 01-1289), Ford made no motion *in limine* or objection to limit or exclude evidence of out-of-state conduct.[16] And unlike it did in the two years before the Romo trial, in *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002), and *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *petition for cert. filed,* 71 U.S.L.W. 3519 (U.S. Jan. 21, 2003), Ford did not submit its own pattern instruction limiting the jury's consideration of out-of-state conduct in this case. Thus, despite *repeated* opportunities, Ford waived its challenge to the admission, use and consideration of "extraterritorial" Bronco profits.

After trial, Ford made *no request* for a new trial based either on the admission of evidence of Bronco profits, or based on any "misconduct" of counsel in discussing that evidence in closing argument. Ford did, for the first time, make a brief passing reference to Bronco profits in its post-trial motion, reiterating its *in limine* argument that consideration of Ford's "net worth" was improper. But Ford could not seek a new trial based on the "erroneous" admission of Bronco profits evidence because such alleged error must have been "excepted to" during trial. Cal. Code of Civ. Proc., § 657(7). Having waited for an adverse verdict without raising the issue, Ford waived grounds for seeking a new trial based on the admission of Bronco

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[15] *Hilts v. County of Solano*, 265 Cal.App.2d 161, 171 (1961); *People v. Duran*, 140 Cal.App.3d 485, 493-494 (1983); *In re Conservatorship of Gregory*, 80 Cal.App.4th 514, 520-521 (2000).

[16] *See* e.g., *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1222 n. 17 (Alaska 1998) (noting that unlike BMW, GM made no motion *in limine,* or objection to closing argument regarding "extraterritorial sales" and waived the "extraterritoriality argument").

profit evidence.[17] Not objecting to plaintiffs' counsel's closing argument referring to Bronco profits, Ford waived grounds for a later challenge.[18] Then, in the Court of Appeal, Ford again only challenged admission of evidence of its "net worth," and made no constitutional challenge to the admission of Bronco profits evidence.[19]

Despite these facts, Ford falsely states that the Court of Appeal "rejected" Ford's argument that *BMW* precluded punishing Ford based on nationwide "profits" on the Bronco. Cert. Pet., at 2, 3, 7 & 8. The Court did not consider or dispose of the issue because Ford *never preserved or presented* the issue for the Court's review. Ford cannot present this claim now.

B. No evidence shows that the jury punished out-of-state conduct.

Ford also raises no federalism issue because the jury did not punish out-of-state conduct. The jury punished Ford for killing three California citizens in the presence of their children and siblings and to deter similar future misconduct in that state.

In *BMW*, this Court applied principles of state sovereignty and comity to conclude that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States." *BMW*, 517 U.S. at 572. *BMW* involved a fraudulent sale in Alabama where the jury multiplied the number of paint-damaged cars sold nationally times the average damage to each car to make the punitive damage

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[17] *In re Da Rosa's Estate*, 82 Cal.App.2d 550, 556 (1947); *Baron v. Sanger Motor Sales*, 249 Cal.App.2d 846 (1967).

[18] *Warner Const. Co. v. City of Los Angeles*, 2 Cal.3d 285, 302-303 (1970); *Brokopp v. Ford Motor Co.*, 71 Cal.App.3d at 860.

[19] *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987); *Adams v. Robertson*, 520 U.S. at 88-89; *People v. Ashmus*, 54 Cal.3d 932, 985, n. 15 (1991).

award. Because the award was based on sales outside Alabama, and because not disclosing similar minor paint damage was lawful in other States, this Court found the award violated federalism principles. *Id.* at 573-74.

This case involved deaths caused *in* California. There was no "other" out-of-state lawsuit evidence because plaintiffs presented none. The only evidence of harm caused by Ford's pre-production "malice" was the *Romo* accident, and the only victims of that malice, the *Romos*. Unlike *BMW*, there was no evidence of similar out-of-state misconduct, and therefore, the jury could not have punished Ford for such other bad acts. Also, unlike *Campbell v. State Farm*, there was no evidence of dissimilar multi-state bad faith acts in a national "scheme." 2001 WL 1246676, at *11-*12.

Further, unlike *White v. Ford*, there was no evidence of nationwide consumer complaints, a NHTSA investigation because of complaints, or a national recall letter campaign for more than 800,000 vehicles. *White*, 312 F.3d at 1003-1004, 1009. In *White*, Ford requested, but was refused, an instruction limiting the jury's consideration of this out-of-state evidence. *Id.* at 1013. Here, Ford requested no such instruction because there was no evidence of other out-of-state complaints or conduct.

Also, the *White* Court found Ford was punished for its "failure to warn" consumers across the country. *Id.* at 1019. But the jury rejected plaintiffs' failure to warn theory of liability in this case. CT 1477. Thus, the Romos' punitive damage award could not have been based on that alleged failure.[20]

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[20] Ford has consistently tried to portray the jury as inflamed with passion, prejudice, and "run amok," but this jury rationally decided the issues, including rejecting plaintiffs' failure to warn theory, finding plaintiff Juan Romo (10%) and a third party (12%) comparatively at

(Continued on following page)

Indeed, in *White*, Ford's "failure to warn" was "actually *lawful* in a number of other states." 312 F.3d at 1019 (italics in original). There is no such issue here. No state holds that maliciously marketing a defective product that kills is "lawful."

Still, Ford argues that the Court of Appeal considered "unlawful" out-of-state conduct citing a partial quotation from the opinion, stating: "the interests California seeks to protect – individual human lives – is neither unique to California nor limited to its own citizens." Cert. Pet., at 7. But the quotation continues: "any 1978 Bronco *operated on California highways* creates the same risks to its occupants no matter where the vehicle was sold nor where its occupants reside." 99 Cal.App.4th at 1151, n. 3 (emphasis added). The Court *only* considered Ford's conduct as it affected California.[21]

C. An award which includes consideration of "profit" from malicious conduct presents no constitutional issue and no basis for certiorari.

Even if Ford had preserved a challenge to the admission of evidence of Bronco profits, no constitutional violation exists because: 1) there is no denial of due

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fault, and choosing its own punitive damage figure contrary to what plaintiffs' counsel had suggested.

[21] Ford also cites an isolated reference in plaintiffs' counsel's closing argument about the need to "warn" a hypothetical mother "in Montana" to suggest the jury punished out-of-state conduct. Cert. Pet., at 25-26, and *see* RT 9998:22-9999:7. But there was no evidence of any harm in Montana in this case, and no request to punish Ford for any misconduct occurring in Montana, or any other state.

Further, even if the reference to Montana were to be construed as a request to hold Ford liable for failing to warn in that state, the Romos' punitive damage award could not have been based on such a warning failure because the jury rejected plaintiffs' failure to warn theory.

process in considering "total" profits obtained from the sale of a defective product; and 2) the jury did not "deprive" Ford of those profits.

Like "financial position," this Court has approved the "profitability" of the wrongful conduct as a factor the jury may consider in awarding punitive damages. *Haslip,* 499 U.S. at 22. Further, since out-of-state "conduct" may be considered on the "reprehensibility" issue, evidence of profits from that conduct likewise should be admissible for the same purpose. *BMW*, 517 U.S. at 574, n. 21.

A defendant's "financial condition" can be a complex issue. A jury must be permitted to consider different financial "factors" because reliance on just one factor may inaccurately reflect the defendant's true financial condition. For example, evidence that a defendant has little or no "net worth" on paper, may not accurately reflect the defendant's actual ability to pay.[22] Similarly, where a defendant makes "little profit" on a defective product in relation to its overall financial condition, "merely taking away that profit may or may not impose much punishment on the seller."[23] Hence, a jury must be permitted to consider any financial information which fairly reflects the defendant's overall "financial condition" or ability to pay.[24]

Under California law, once a plaintiff has established a *prima facie* case of liability for punitive damages, the plaintiff may present evidence of "[t]he profits the defendant has gained by virtue of the wrongful course of conduct", and "[t]he financial condition of the defendant." Cal. Civ. Code, § 3295(a). Thus, in closing argument, without objection, plaintiffs' counsel discussed Ford's

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[22] *See* e.g., *Zaxis Wireless Communications, Inc. v. Motor Sound Corporation*, 89 Cal.App.4th 577, 582-583 (2001).

[23] *See* e.g., *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W.2d 35, 52-53 (Tex. 1998).

[24] *See* e.g., *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th 1645, 1659-1660 (1996).

"financial condition" *and* the huge profits and economic benefit Ford reaped from the sale of the 1978-79 Bronco. By the time of trial, Ford's profits on the Bronco had grown in value to more than $1.076 billion.[25]

In considering this "profit" evidence, the jury did not make an award based on a multiplier of Ford's national sales figures, like *BMW*, or a number disgorging Ford of "all" its ill-gotten gain ($1 billion or more).[26] Instead, the jury rationally chose *its own figure* which turned out to be roughly equivalent to 1.2% of Ford's net worth ($25 billion), nine days of after-tax profits ($20 million a day), a fraction of Ford's $14 billion in cash on hand, and a minor portion of Ford's total economic benefit from the Bronco. Profit was just one factor considered by the jury.

After considering the size of the award relative to all the appropriate financial factors, the Court of Appeal acknowledged the rational basis for the jury's verdict and "could not [itself] conclude that the level of damages was excessive." *Romo*, 99 Cal.App.4th at 1149.

Further, even if it were assumed that the jury's award and the Court of Appeal's analysis were based only upon evidence of Ford's total profits on the Bronco, which they *certainly* were not, there still would be no constitutional violation. Deducting the *Romo* verdict, Ford retained over $785 million of the $1.076 billion figure argued to the jury,

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[25] Plaintiffs' counsel used a 10% return on $160 million in profits Ford made on the 1978-79 Bronco to calculate a present value of $1.076 billion, despite the fact that Ford reported internal rates of return which often far exceeded 10%. RT 9585:19-9586:25; Exhibit 302.564a, p. 2.

This calculation did not include the huge economic benefit to Ford from the major "market share" it sought and captured when it "rushed" the "stop gap" Bronco into the explosively growing "family" SUV market.

[26] *See also Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561 (Indiana 1999), *cert. denied*, 529 U.S. 1021 (2000), ($13.8 million award equal to 24% of total money saved nationally was held not to be excessive).

or more, from 1978-79 Bronco sales. Thus, there would remain ample room for other states to protect their interests.

Ford's concern that allowing the jury to consider profits from sales in other states "subjects the defendant to multiple and duplicative penalties on the basis of the same challenged design feature," Cert. Pet., at 25, is entirely premature and not presented here. Also, "multiplicity" is not an issue because a jury can always consider other awards in deciding the appropriate level of a punitive award to deter and punish.[27]

Finally, contrary to Ford's suggestion, there is no need to hold this case pending the decision in *Campbell v. State Farm*. Here, the jury imposed punitive damages for wrongful conduct, amounting to manslaughter, that occurred in California. No national conduct was punished. No jury instruction limiting consideration of national conduct was refused. Further, the reprehensibility was extreme, the harm – death – not "minor" economic harm, with ample notice to Ford of the potential penalty.

CONCLUSION

In June 2003, 10 years will have passed since this horrible accident occurred. This case is unique *not* because it represents an aberration or injustice to Ford, or a threat to American manufacturers, but because it has taken this extraordinary case to finally punish Ford for keeping a known hazard hidden for so long. Outwardly indistinguishable from Broncos built from 1980 through 1996, no one before has obtained Ford's admission that for just two model years – 1978 and 1979 – it put a strong looking roof on a higher rollover risk vehicle that Ford

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[27] *See* e.g., *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d at 54; *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d at 812; *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th at 1660-1663.

knew would "fail" in a rollover accident. No one has ever shown that for the sake of pursuing its own huge economic gain, Ford left out safety features on the Bronco it knew were needed to protect the "family" occupants inside. Ford's misconduct cost three human lives and risked thousands more.

Under principles established by this Court, the California Court of Appeal appropriately determined that the amount of the punitive damage award was not unconstitutional. This Court's principles were not "eviscerated," "trumped," "conflicted," "rejected," or avoided by an "end run"; they were expressly followed. Ford's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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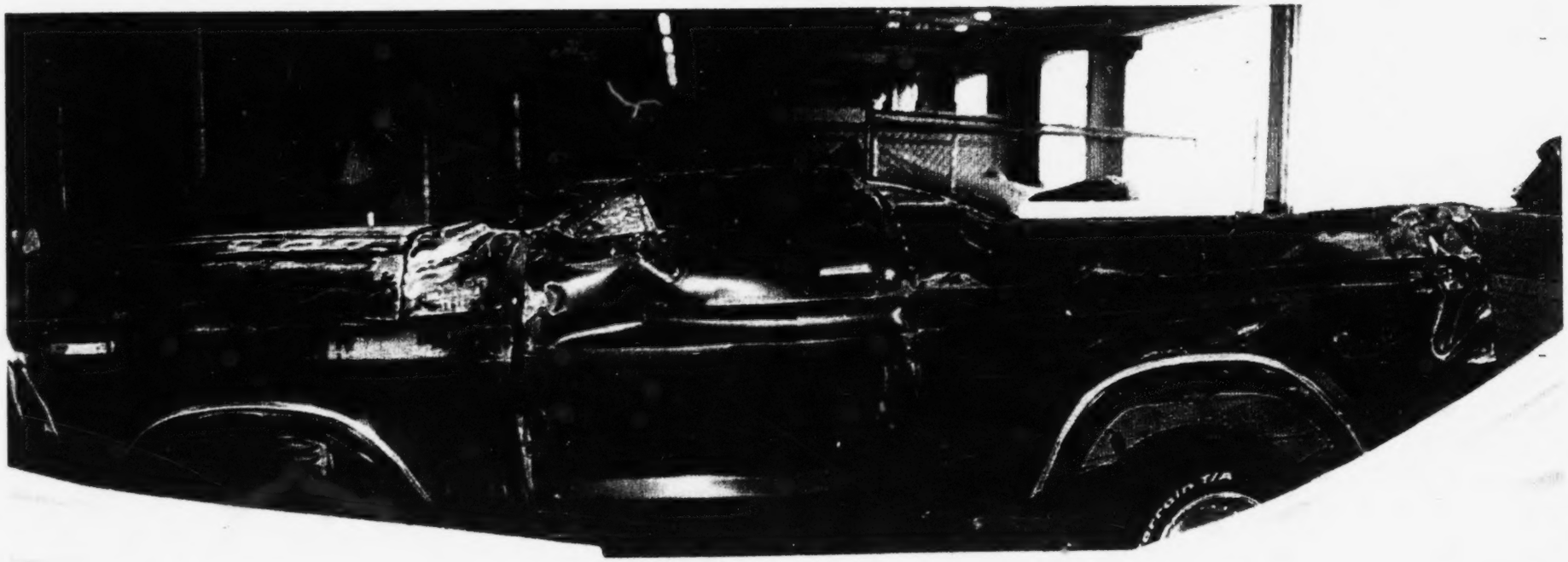

Exhibit 28.12

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fifth Appellate District

REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEFS

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Jane Spencer and Cynthia Crossen, *Why Do Americans Believe Danger Lurks Everywhere? Fixation on Risk, Fed by Labs, Law and Media, Haunts The World's Safest Nation*, WALL ST. J., Apr. 24, 2003, at A1 3

REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEFS

Respondents have filed two supplemental briefs, one addressing this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (April 7, 2003) ("SF Supp."), and one purporting to address the six *amicus* briefs filed in support of certiorari ("*Amicus* Supp."). Both of these briefs further illustrate why, at a bare minimum, a GVR is required. But more importantly, they (like the supplemental brief filed by Respondents in *Ford Motor Co. v. Smith*, No. 02-1096) also illustrate why plenary review is warranted to address critical issues unique to product liability and other cases involving activities that benefit society but necessarily create a risk of personal injury and death.

1. In one brief, Respondents argue that "there is no basis for" GVR in light of *State Farm*, *see* SF Supp. 1, 9-10, while in the other they declare that *State Farm* addressed and resolved the "central theme" of all six *amicus* briefs by "clarify[ing] the standards for determining reprehensibility, evaluating the allowable ratio between punitive and compensatory damages, assessing the relevance of other sanctions, and ascertaining the ability of a jury to award punitive damages for conduct occurring in other states." *Amicus* Supp. 2. As Ford demonstrated in its Reply (at 8-10), *State Farm* plainly mandates a GVR for further consideration of Ford's due process challenges to the $290 million award here, which is the largest personal injury award affirmed in U.S. history, is 63 times the compensatory award, and 362 times the maximum available civil fine (which Respondents again do not mention).

In fact, this Court in *State Farm* squarely rejected multiple fundamental predicates of the court of appeal's decision reinstating the award, including (1) its improper effort to punish Ford in this civil case for a crime that was never alleged or proven and its disregard of the "comparable penalties" guidepost based on this specious criminal analogy; (2) its ruling that Ford's "enormous monetary resources" provided Ford with adequate notice that such a massive fine

could be imposed; (3) its holding that a 63:1 ratio is constitutionally permissible despite the substantial $4.6 million compensatory award; (4) its holding that Ford could be punished based on its nationwide sales; and (5) its highly deferential review of the jury's verdict, which incorporated California's lax "substantial evidence" standard, assuming the jury found every disputed fact against Ford, and then compounding the problem by assuming (as Respondents still do, SF Supp. 1) that the trial court had endorsed this shocking verdict—even though the trial court had *overturned* the jury's verdict as a "fundamentally suspect" product of "passion and prejudice." Pet. App. 37a, 45a; *see generally* Reply 8-10.

Finally, Respondents' suggestion that *State Farm* does not bear on the analysis of punitive damages in the personal injury context cannot be reconciled with this Court's decision to GVR two personal injury cases (and five cases overall) in light of *State Farm*. *See Anchor Hocking, Inc. v. Waddill*, No. 02-370; *Key Pharms. v. Edwards*, No. 02-342.

2. From start to finish, Respondents try to distinguish *State Farm* on the very basis that Ford has argued warrants plenary review: that this case, unlike "any punitive damages case thus far reviewed by this Court" involves "'physical' harm" and "deaths," rather than "mere 'economic' harm." SF Supp. 1, 2. Relying on their claim that "Ford knew its conduct would likely kill, and Ford's conduct has killed," SF Supp. 10—and ignoring the fact that every manufacturer of virtually every product, from boats and bathtubs to pharmaceuticals and forklifts, "knows" that its product "would likely kill" and "has killed"—Respondents argue that Ford's balancing of safety and utility 25 years ago was at the "*highest* levels of reprehensibility," because of the results of the single accident here. SF Supp. 1.

The fallacy of Respondents' simplistic and indefensible approach to the issue of reprehensibility in product liability cases is demonstrated by a front-page article in the *Wall Street Journal* published just yesterday, showing that *thousands* of injuries were caused in 2001 by pillows, books,

crayons, nails and electric Christmas decorations, among other products. *See* Jane Spencer and Cynthia Crossen, *Why Do Americans Believe Danger Lurks Everywhere? Fixation on Risk, Fed by Labs, Law and Media, Haunts The World's Safest Nation*, WALL ST. J., Apr. 24, 2003, at A1. Surely, if a jury finds a defect in, for example, an electric Christmas decoration, a massive punitive damage award cannot be permissible simply because the manufacturer knew of the potential for injury. Indeed, these considerations presumably explain why this Court in *State Farm*, in a passage ignored by Respondents, was careful to note that "[t]he existence of any one . . . factor[ ] weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award." Slip op. 8.

In short, the mere fact that the jury found that Ford's conduct in selling the 1978 Bronco as designed led to the tragic deaths in this case is no reason to ignore, as Respondents do, all of the factors weighing in favor of reduced reprehensibility, including (1) Ford's compliance with government and industry standards; (2) the reasonable disagreement within the engineering community over roof strength standards; (3) the lack of any evidence that the 1978 Bronco's roof design had injured any other person; and (4) the vagueness of California's malice standard and the lack of any evidence that any individual at Ford acted maliciously or believed that the company was "compromising consumer safety" when it built the 1978 Bronco. Pet. App. 32a; *see also* Reply 2-3. The presence of personal injury does not permit a court to abdicate its responsibility to evaluate the degree of reprehensibility through a careful examination of the entire record—including undisputed factors that are not necessarily inconsistent with the jury's "malice" finding—under proper constitutional standards.

Rather than analyze the *Gore* guideposts with "care, to ensure both reasonableness and proportionality," *State Farm*, slip op. 17, Respondents (like the court below) mischaracterize the record and engage in exaggerated and *ad hominem* invective that casually re-labels genuine disputes regarding the appropriate risk-utility balance as "manslaughter" and

"kill[ing]." SF Supp. 1, 10. As Ford and the *amici* have demonstrated, *see* Pet. 9-19; Reply 1-8, lower courts around the country—including the court of appeal here and the courts in *Smith* and *Clark v. Chrysler Corp.*, 310 F.3d 461 (6th Cir. 2002)—have nullified the *Gore* guideposts in product liability cases involving personal injury, thus creating a problem of fundamental importance to the entire business community. Respondents' supplemental briefs have provided the Court with additional evidence that plenary review is needed to bring this problem to a halt once and for all.

CONCLUSION

The Court should grant plenary review or, in the alternative, GVR. Respectfully submitted.

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fifth Appellate District

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This Court's ruling in *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (April 7, 2003), demonstrates that the $290 million punitive damage award in this case violates the Due Process Clause; at a minimum, this Court should grant certiorari, vacate the judgment and remand for further consideration ("GVR") in light of *State Farm*. But as Ford demonstrated in its Petition, and as illustrated by Respondents' opposition and the six briefs joined by 39 *amici curiae* representing virtually every sector of the American business community, there are special and powerful reasons for this Court to go farther and grant plenary review. Ford recognizes that this request for plenary review in the wake of *State Farm* is unusual, but this case—along with *Ford Motor Co. v. Smith*, No. 02-1096 (pet. for cert. pending), and *Clark v. Chrysler Corp.*, 310 F.3d 461 (6th Cir. 2002) (pet. for cert. forthcoming)—presents an unusually good opportunity to address critical and recurring issues unique to product liability and other cases involving activities that are beneficial to society but that necessarily create risks of serious personal injury and death.

I. Plenary Review Is Warranted

Respondents' opposition demonstrates why the Court should grant plenary review. To avoid any meaningful analysis under *BMW v. Gore*, 517 U.S. 559 (1996), Respondents, like the court below, like the courts in *Smith* and *Clark*, and like numerous other courts, argue that, "unlike any other case decided by this Court," Ford's design of the 1978 Bronco "risked lives and caused deaths." Opp. 8. They even contend that *State Farm* has no bearing here because Ford's design decisions "amount[ed] to manslaughter" and resulted in "death—not 'minor' economic harm," Opp. 29, a theme that was reflected in public comments as soon as *State*

Farm was decided.[1] Neither *Gore* nor *State Farm* supports this argument, but the lower courts have erroneously adopted it time and time again, and it is clear Respondents and other plaintiffs intend to keep advancing it despite *State Farm*. There is no need to allow these issues to percolate; that process has been occurring for the seven years since *Gore*, and has produced numerous huge punishments that make a mockery of due process. Plenary review is warranted.

A. The Concerns Expressed In *State Farm* Are Magnified, But Ignored, In Products Cases

As confirmed by the *amici*, the concerns expressed in *State Farm* about arbitrary and excessive punitive damages (slip op. 6-7) are particularly acute in product liability and other personal injury cases.

The Court recognized "the imprecise manner in which punitive damages systems are administered," slip op. 7, including the danger of inadequate jury instructions: "Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Id.* (citation omitted). Here, the court rejected Ford's proposed punitive damage instructions (Pet. App. 49a-53a), and, by substituting a generic instruction over Ford's objection that it violated due process and was unconstitutionally vague, RT 9657, left the jury with little or no guidance. Moreover, product liability cases almost always involve "inflammatory" evidence regarding the defendant's wealth and other "evidence that has little bearing as to the amount of punitive damages," slip op. 7, yet instructions usually omit the factors that *do* bear on the size of the punishment. *See, e.g.*, Brief of

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[1] *See, e.g., Rule by numbers—An end to America's enormous punitive-damages awards?*, The Economist, Apr. 12, 2003, at 66 ("Robert Peck of the Association of Trial Lawyers of America says that the single-digit guideline does not apply when plaintiffs have been bereaved or injured. If the courts agree with him . . . product-liability suits would all be unaffected. The gold mine may not be exhausted yet.").

Amici Alliance of Automobile Manufacturers *et al.* at 4 ("The automotive industry has been subjected to random imposition of punitive damages, in huge amounts, with respect to designs that meet industry standards, that exceed federal safety standards, that NHTSA itself has investigated and not found defective, and that have been found safe by other juries.").

Thus, while Respondents repeatedly claim that Ford's conduct was grossly reprehensible because "the jury found malice," Opp. 14, the jury's largely uninformed finding says nothing about the *degree* of reprehensibility that is central to the *Gore* analysis. *See* 517 U.S. at 588 (Breyer, J., concurring) (state statute authorizing punitive damages in cases of "malice" does not "contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damages awards"). California defines "malice" to include "conscious disregard for the . . . safety of others," CAL. CIV. CODE § 3294(b)—in other words, "broadly, to encompass far more than the egregious conduct that [the] term[ ], at first reading, might seem to imply." *Gore*, 517 U.S. at 588 (Breyer, J., concurring).

Particularly as applied to product liability design defect cases, the term "malice" is fraught with vagueness. Here, for example, the court of appeal reasoned that Ford acted with malice because it allegedly disregarded safety when it marketed a vehicle it "knew" could cause injury, and then leveraged that conclusion directly into a finding of serious reprehensibility. Pet. App. 35a-39a. *See also Smith* Pet. App. 17a; *Clark*, 310 F.3d at 482 (Chrysler's design more reprehensible than the "repaint[ing]" in *Gore* because it "resulted in the loss of life"). But this approach nullifies the *Gore* reprehensibility guidepost because *all* design decisions require a balancing of safety versus utility, and consequently there is a danger that *any* design decision could be deemed by a jury in hindsight to have been "malicious," especially when the jury is confronted with a tragic accident that has resulted in seri-

ous injuries or death. Pet. 14-15.[2] This risk of arbitrary and excessive punishment makes it particularly important that the "principles set forth in *Gore* . . . be implemented with care," slip op. 17, but courts have cast them aside in product liability cases involving personal injury or death. *See* Pet. 9-11; Brief of *Amici* Product Liability Advisory Council ("PLAC"), *et al.* at 10 ("we are unaware of a single published post-*BMW* opinion concluding that a manufacturer's conduct was not sufficiently egregious to warrant the penalty imposed"). Respondents do not deny this phenomenon—indeed, they vigorously *defend* it. Opp. 11-13.

The court of appeal focused so heavily on the tragic nature of the injuries that it justified the $290 million penalty by equating Ford's design of the Bronco roof 25 years ago to "involuntary manslaughter," Pet. App. 35a, a label Respondents repeatedly hammer (*e.g.*, Opp. 1, 8, 12). Ford, of course, was "not . . . accorded the protections applicable in a criminal proceeding." *State Farm*, slip op. 6-7, 18.

These problems plague companies of all types. *See, e.g.*, Brief of *Amici* Twenty Leading Non-Automotive Companies at 6-7 ("If merely manufacturing a product or engaging in an activity with a potential for causing serious injury is, in and of itself, highly reprehensible, then the *BMW* reprehensibility guidepost will never constrain excessive punitive damage awards in cases against companies like *amici*."). Moreover, excessive punitive damages impose severe punishment "for decisions that, in other contexts, would be viewed as entirely appropriate and often beneficial." Brief of *Amicus* Mercedes-Benz USA at 6 (discussing how punitive damage awards deter innovative safety improvements).

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[2] The court here even recognized that there was no evidence that any individual Ford employee acted with malice, but nonetheless stretched the malice standard to hold that "in the case of a large corporation" it could "piec[e] together knowledge and acts of the corporation's multitude of managing agents" spread over decades. Pet. App. 23a-25a, 32a.

B. Respondents' Factual Distortions Illustrate The Special Problems Of Products Cases

Respondents' distortion of the record renders the facts of this case unrecognizable, but their tactic illustrates why this Court should grant plenary review. Respondents use the jury's 9-3 vote finding "malice," coupled with the emotion and sympathy generated by the death of three people, as a predicate for unsupported assertions that were not the subject of jury findings. For the most part, Respondents do not cite the record (Opp. 4-5), and simply ignore all undisputed facts favoring Ford. A few examples show how Respondents, and plaintiffs in product liability cases generally, exploit "hindsight bias" and litigation complexities to nullify the *Gore* due process guideposts. PLAC Br. at 4-5 ("Looking through the virtually inescapable lens of hindsight bias at a seriously injured plaintiff on the one hand and a large corporate defendant that balanced safety against other benefits such as product usefulness, attractiveness, and cost to consumers on the other, juries are easily provoked to a state of outrage that leads them to award astounding sums in punitive damages.").

1. Respondents declare that "Ford knew" that "strong roofs . . . protect passengers in rollover accidents," Opp. 4, but fail to mention the undisputed evidence that this theory has been vigorously debated for decades within the automotive engineering community. In fact, Ford introduced the testimony of Dr. Edward Moffatt, recognized as one of the preeminent experts in the field of rollover biomechanics and automotive safety design. Dr. Moffatt testified, based on extensive testing and more than 20 years of study, that roof strength does not make a significant difference in preventing serious injuries in rollover accidents. *See* RT 8433 ("[I]t does not matter statistically, and test-wise it was proven again and again that when people wear production belts in production cars your head will be against the roof. And if your head is against the roof and you suffer an impact, at that point it doesn't matter if the roof is stronger."); *see also* RT 8675 (adding strength beyond federal requirement made "no differences" in safety).

In other words, the uncontroverted evidence shows not that "Ford knew" that Respondents' experts were correct, but rather that for the past 30 years there has been a serious, reasonable debate regarding the extent to which roof strength reduces injuries in rollover accidents.[3] Ford built the Bronco roof to exceed by 100% the only federal roof strength standard that then existed—which applied only to passenger cars but not SUVs—and to exceed by 30% the standard that NHTSA enacted more than a decade later specifically to govern SUVs.[4] Respondents' criticisms of these roof strength standards show, at most, a reasonable disagreement on safety policy issues, not gross reprehensibility. *See Gore*, 517 U.S. at 570-71, 577-78 (even assuming that it would be "wise for every State to adopt Dr. Gore's preferred [disclosure] rule," BMW's reasonable reliance on state statutes adopting different rule did not justify $2 million award).

2. Respondents falsely claim that "Ford knew that in . . . rollovers weak roofs would 'penalize' (kill) seat-belted passengers (who remain upright)." Opp. 4. This is a reference to a single 1968 memorandum unrelated to the 1978 Bronco in which the author expressly recognized that the limited data he was reviewing were inconclusive, Ex. 302.241, at

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[3] "When government agencies or an entire industry have reached the same conclusion as the defendant, it is apparent that reasonable people could reach that conclusion, and the degree of reprehensibility under *BMW*—if reprehensibility exists at all—is necessarily very low." Brief of *Amici* National Ass'n of Independent Insurers, *et al.*, at 11. It is worth noting that, when Respondents claim that "[a]utomotive experts" made critical comments about the Bronco, Opp. 1, they are talking about their own paid experts in this case.

[4] Ford's engineers testified that they believed that the 1978 Bronco was safe and that the roof, which was designed to be removed like that on a convertible, provided "adequate protection" given the nature of the vehicle. RT 6059-60, 6572, 6578, 6589. And three Ford engineers who designed the 1978 Bronco, including the chief engineer, testified that they used the Bronco as a personal vehicle to transport their families. (Bambanek Dep. at 7-12; Bibb Dep. at 9, 73-74, Kohrs Dep. at 519) (attached to Carcione Decl., 7/28/00).

BB002567 ("materially small" and "marginal" significance of data provides "indication, not a proof"). Other memoranda show that Ford policymakers ultimately rejected the tentative conclusion contained in that 1968 memorandum. *See, e.g.*, Ex. 230.39.8 (1971 Ford paper: "[B]ased upon the data reviewed we have seen no evidence to conclude or correlate roof strength with occupant safety/injury."). This was an era of sharp debate (but sparse data) in the engineering community regarding roof strength and seat belts, so it is hardly surprising, and surely not "reprehensible," that engineers within Ford were debating these issues too.

3. Respondents claim that Ford violated an "internal engineering 'consensus' that SUVs need roll bars . . . by 'deleting' the steel 'integral roll bar' in the Bronco's 'B' pillar," Opp. 5, but while some Ford engineers in the late 1960s may have felt that roll bars "probably" should be required, RT 3209, other engineers at Ford and throughout the industry disagreed. Thus, Ford's internal design standards indisputably did not require a roll bar on SUVs, nor did the internal standards of any other manufacturer. RT 3430-31; RT 6078-79. Moreover, Respondents fail to mention the undisputed fact that Ford also made changes during the design process to the 1978 Bronco's B-pillar—where the originally-planned roll bar would have been—so that, as redesigned, the B-pillar was strong enough to provide the same protection as the standard roll bar would have provided. RT 6077.[5]

4. The 1978 Bronco's roof design indisputably was comparable to the designs of numerous other SUVs of that era. RT 2517-19, 6814-16, 2591-92. None of these vehicles had a standard roll bar, and there is no evidence that their fiberglass roofs were reinforced with steel. Respondents point

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[5] Respondents also argue that Ford violated an internal ban on using fiberglass for an SUV roof, Opp. 5, 13, but a Ford engineer with personal knowledge testified that it was *ten years after* the 1978 Bronco's design that Ford first established a policy against using fiberglass. RT 6059-61. Respondents' expert, who was not involved in the Bronco's development, had no personal knowledge to the contrary. RT 3295-96, 3427-32.

to no evidence, and there is none, that anyone at Ford perceived a "'roof crush problem,'" Opp. 2, with the 1978 Bronco when, in 1980, Ford made a safety improvement by strengthening the Bronco roof. Rather, the only evidence is that Ford sought to match a design change that had been made in the Chevy Blazer—hardly the sort of egregious misconduct that warrants a $290 million sanction.[6]

II. At A Minimum, A GVR Is Warranted

This Court should, in the alternative, GVR in light of *State Farm*, as it did yesterday in five other cases, including two product liability cases (*Anchor Hocking v. Waddill*, No. 02-370; *Key Pharms. v. Edwards*, No. 02-342). Among other things, the Court in *State Farm* held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and noted that legislatures have historically authorized sanctions providing for double, triple, or quadruple damages. Slip op. 14-15. The Court further held that a $1 million compensatory award "was substantial," and that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 15. *See* Pet. 16 (arguing that 1:1 ratio may be excessive in products cases). The compensatory damages assessed against Ford are

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[6] Respondents' argument that Ford's own statistical evidence at trial showed "the extreme danger" of the 1978-79 Bronco, Opp. 1-2, when compared to the 1980 Bronco and other SUVs, is a manipulated illusion. Ford's evidence actually showed that, with respect to the rate of serious injuries and deaths experienced in SUV rollovers, the 1978-79 Bronco was about average. *See* Exhs. 204.5, 208.19; *see also* RT 5121 (respondents' expert testimony) ("You are 99.99 percent as likely to survive [any given] year in a '78-79 Bronco as you are if you owned an '80-'96" Bronco). Respondents' other contentions—*e.g.*, that Ford attempted to create the false appearance of a roll bar, that Ford "rush[ed]" the 1978 Bronco to market, that Ford's testing was inadequate, and that Ford implemented a "corporate policy of 'misleading' the government" (Opp. 5)—are products of the same misleading manipulation of the record.

even more "substantial"—$4.6 million—and the 63:1 ratio is presumptively unconstitutional. Slip op. 15.[7]

State Farm makes clear that the court of appeal erred in deeming the third *BMW* guidepost—comparable penalties—"inapplicable" because Ford's alleged conduct could somehow be analogized to a crime. Pet. App. 39a; Pet. 17-19. This Court rejected an identical ruling in *State Farm*, slip op. 18, and held: "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." Here, the court of appeal *expressly relied* on the "remote possibility of a criminal sanction" to sweep aside the comparable penalty guidepost—and directly on-point penalties—to uphold the $290 million punishment.[8]

Like the Utah Supreme Court in *State Farm*, which reinstated the award based on the defendant's "enormous wealth," slip op. 16, the court of appeal here held that Ford's "enormous monetary resources" provided "adequate notice of the potential for punitive damages awarded in this case," Pet. App. 40a; Pet. 19-26. This Court in *State Farm* rejected this precise reasoning, holding that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," as it "bear[s] no relation to the award's reasonableness or proportionality to the harm." Slip op. 17.

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[7] Respondents assert that the $4.6 million compensatory damages award was undercompensatory, Opp. 16-17, but "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages." *State Farm*, slip op. 8. In fact, Respondents were dramatically *over*compensated for their personal injuries. Juan Romo, for example, received a noneconomic damage award of over 40 times what he requested. CT 1481; RT 9554. Moreover, over 80 percent of Respondents' damages were emotional distress damages, CT 1481, which "contain [a] punitive element." *State Farm*, slip op. 16.

[8] Respondents do not even mention the comparable civil penalty established by federal law, which at the time of the conduct and trial, was $1,000 per vehicle, up to a maximum of $800,000 for a defective fleet of vehicles. *See* 49 U.S.C. § 30165(a).

The court here also relied on Ford's profits and sales *nationwide*, and thus embraced Respondents' argument that the jury should impose a punishment sufficient to make Ford, consumers, and the federal safety agency change their behavior in other States. Pet. 24-26.[9] But *State Farm* held that punitive damages may not be imposed to punish and deter out-of-state conduct, even unlawful conduct, that "bore no relation to [respondents'] harm." *State Farm*, slip op. 11-12. Ford also argued in its Petition (at 25) that the lower court's approach risked subjecting Ford to multiple and duplicative punishments if left uncorrected—a concern expressly recognized in *State Farm*. Slip op. 12.[10]

Finally, this Court performed an "[e]xacting appellate review" and its own independent examination of the facts in applying the *Gore* guideposts. *See* slip op. 8-18. This approach starkly contrasts with the lax standard of review employed by the court of appeal. Pet. 26-29.

CONCLUSION

The Court should grant plenary review or, in the alternative, GVR. Respectfully submitted.

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[9] Respondents' contention that Ford waived this argument is incorrect. Ford moved *in limine* to exclude *all* evidence of its financial condition, including "all evidence of Ford's net worth related to economic activities taking place outside the State of California." CT 184; RT 343-47. Ford's counsel explained that the Constitution barred respondents' "attempt to ascertain what profits the defendant engaged in *for that activity* outside the jurisdiction and incorporate that into the punitive calculations." RT 345-46 (emphasis added). The trial court denied Ford's motion, thus preserving the issue, *see* Pet. 3 n.1. Ford reiterated these arguments post-trial in its new trial motion and reply, CT 30, 3418, and the court of appeal rejected Ford's argument under *Gore* that the plaintiff must "prove the defendant's profits from California only." Pet. App. 39a n.3.

[10] Moreover, although "a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages," *State Farm*, slip op. 12, Ford was punished for dissimilar acts by the improper injection into jury deliberations of a *60 Minutes II* broadcast regarding alleged defects in Ford Mustangs. *See* Pet. 5.

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JUAN RAMON ROMO, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY & COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae National Association of Independent Insurers ("NAII") is a national trade association of over 700 member companies dedicated to expanding the choices available to the insurance-buying public, reducing the costs of insurance to its policyholders, and promoting competition. For over 50 years, NAII has represented the interests of property and casualty insurance companies and their customers throughout the United States. *Amicus curiae* State Farm Mutual Automobile Insurance Company is one of the largest automobile insurance companies in the United States and does business nationwide.

Amici believe that this brief will assist the Court by providing perspective on special issues regarding punitive damages that confront national businesses that engage in consumer transactions. Claims for punitive damages against insurance companies, manufacturers of mass produced goods, and other such consumer-oriented businesses tend to produce arbitrary and often excessive punitive damages awards. The imposition of punitive damages against such corporate defendants raises special concerns that do not arise in the context of litigation over single transactions between individuals.

This is at least partly because punitive damages law has historically developed in the context of common law tort actions between individuals. Punitive damages, as one commentator put it, developed "largely as a punishment and deterrent for trespassers, oxen thieves and other such human malefactors."[2] As a result, when the principles of common law punitive damages are applied to the conduct and decision-making processes of a large modern business, punitive damages may be awarded that are excessive as a matter of due process or where due process forbids any punishment

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief, and copies of those consents have been lodged with the Court.

[2] David G. Owen, *Problems in Assessing Punitive Damages against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 15 (1982).

at all. The problem is compounded, in some cases, by juror bias against large out-of-state businesses and manufacturers.

In particular, the assessment of reprehensibility – the most important of the constitutional guideposts set forth by this Court for determining whether a punitive award is excessive – presents difficulties in both products liability and insurance litigation. For example, the complex decision-making that results in the final design of a product may reflect a series of necessary and reasonable risk-utility determinations that, in subsequent evaluations, juries and judges find all too easy to characterize as "reprehensible." The affirmance of the massive punitive damages awards in *Romo* and *Smith* illustrates the arbitrary nature of punitive awards against large corporate defendants and the lack of coherent standards for measuring the "reprehensibility" of corporate conduct.

The *Romo* and *Smith* cases raise constitutional punitive damages issues that are of substantial importance not only to manufacturers, but also to insurance companies and other companies that deal with consumers. In this brief, *amici* address an issue of particular concern to the insurance industry, namely, the constitutionality of a punitive damages award where (as in *Romo* and *Smith*) a corporate defendant has complied with industry standards and government regulations and where there is ground for reasonable disagreement concerning the propriety of the corporate conduct at issue.

SUMMARY OF ARGUMENT

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court held that the Due Process Clause of the United States Constitution imposes constraints on punitive damage awards. The Court identified the degree of reprehensibility of the defendant's conduct as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. Accordingly, it is necessary as a constitutional matter that the determination of the degree of reprehensibility of a defendant's conduct be based on an analysis that produces fair and accurate results.

The analyses of reprehensibility by the California appellate court in *Romo* and by the Kentucky Supreme Court in *Smith* fall far short of the constitutionally required level of

fairness and accuracy. Both courts improperly discounted defendant Ford Motor Company's compliance with government regulations and industry standards and ignored the realities of complex corporate decision-making. In particular, in making product design decisions, manufacturers such as Ford necessarily and properly consider not only a variety of potential safety issues, but also other design concerns such as marketability, ease of operation, durability, and cost.

In many cases where punitive damages are imposed, including *Romo* and *Smith,* the corporate defendant had an arguable basis for believing that its chosen course of conduct was reasonable and conformed to its legal obligations towards consumers – even if a particular corporate decision turned out after the fact to have been wrong or unwise such that compensatory damages were in order for the affected consumer. Most importantly, where a corporation – whether a product manufacturer, an insurance company or other institutional defendant – has complied with government regulations or industry standards, that compliance should generally be found to establish a basis for "reasonable disagreement" as to the propriety of the defendant's conduct. "Reasonable disagreement" should negate or at least substantially lessen reprehensibility and thus weigh heavily against the imposition of punitive damages.

In the context of insurance litigation, some courts have applied the "reasonable disagreement" standard to bar punitive damages in cases where, despite the fact that a jury determines that an insurance company was incorrect in denying a claim or in interpreting the insurance contract, there was a genuine dispute or reasonable disagreement about the propriety of the insurance company's conduct. The "reasonable disagreement" standard provides a fairer and more accurate analytical basis for determining a corporate defendant's "reprehensibility" under *BMW* than the factors used in traditional punitive damages law to assess individual conduct. The use of the traditional factors with regard to corporate conduct often merely encourages anti-corporate biases on the part of judges and juries and results in arbitrary, excessive and unconstitutional punishment of corporate defendants by judges and juries in civil cases.

Amici respectfully submit that application of the "reasonable disagreement" standard in assessing the nature of a corporate defendant's conduct would help alleviate the constitutional problems raised by punitive awards such as those in *Romo* and *Smith*. Certiorari should therefore be granted to clarify the due process constraints on punitive damages and the application of the *BMW* reprehensibility guidepost where a corporate defendant's compliance with government regulations or industry standards creates "reasonable disagreement" as to the propriety of the defendant's conduct.

ARGUMENT

I. Where There Is Reasonable Disagreement as to the Propriety of the Defendant's Conduct, the Imposition of Punitive Damages Raises Significant Due Process Concerns

In *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 490 (1915), this Court set forth the basic principle that where a corporate defendant is justified in believing that a certain course of business conduct is reasonable, the infliction of punishment for that conduct "depart[s] from the fundamental principles of justice embraced in the recognized conception of due process of law." In *Danaher*, this Court set aside a $6,300 statutory penalty awarded to a telephone customer against a telephone company that had disconnected the customer's phone service pursuant to an impartially enforced regulation adopted by the company. The Court determined that because the company's regulation could have been declared unreasonable by the Arkansas legislature, but had not been, the company was "well justified in regarding the regulation as reasonable and in acting on that belief" and that imposition of penalties of $6,300 was "so plainly arbitrary and oppressive as to be nothing short of a taking of [the company's] property without due process of law." *Id.* at 490-91.

Although *Danaher* involved a statutory penalty, the relevance of the due process principle set forth in *Danaher* to punitive damages and the continuing vitality of that principle are demonstrated by this Court's decision in *BMW*. In overturning the punitive damages imposed on defendant BMW, this Court emphasized that BMW had a good faith basis to believe that it was complying with its legal obligations and

that its conduct was not tortious, let alone punishable:

> This [requirement that fraud requires a material misrepresentation or omission] invites line-drawing of just the sort engaged in by States with disclosure statutes and by BMW. We do not think it can be disputed that there may exist minor imperfections in the finish of a new car that can be repaired (or indeed, left unrepaired) without materially affecting the car's value. There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers. For this purpose, BMW could reasonably rely on state disclosure statutes for guidance. 517 U.S. at 579.

The due process principle recognized in *Danaher* has been formulated by some courts and commentators as the "reasonable disagreement" principle, or the "genuine dispute" principle. *See, e.g.*, Dorsey D. Ellis, Jr., *Fairness & Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 22-23 (1982) (for purposes of punitive damages, reckless conduct should be "narrowly defined to exclude reasonable disagreement over the relative danger and utility of an act"). In insurance claims litigation, there was early judicial recognition that where an insurance company has an arguable basis for denying a claim or for other challenged conduct, no punitive damages are warranted as a matter of law, even if a jury later disagrees with the insurance company's assessment of its obligations under the insurance policy. *See, e.g., Mack & Co. v. Lancashire Ins. Co.*, 4 F. 59, 63 (D. Mo. 1880) (to recover damages beyond the value of their destroyed property for vexatious delay in the payment of a policy, plaintiffs must establish that defendants had no reasonable ground for contesting either the validity or the amount of the claim).

Some more recent decisions in insurance cases have also applied the "reasonable disagreement" standard to constrain the imposition of punitive damages for corporate conduct that is determined after-the-fact to be tortious, where, as in *Danaher*, the company was "justified in regarding [its conduct] as reasonable." *Danaher*, 238 U.S. at 490. While these insurance cases apply the "reasonable disagreement" standard

as a matter of state common law, their analysis has constitutional relevance to the due process limits on punitive damages. For example, in *Erie Insurance Co. v. Hickman*, 622 N.E.2d 515, 520-523 (Ind. 1993), the Indiana Supreme Court determined that an award of punitive damages against the defendant insurance company could not be supported where there was probative evidence that the insurance adjuster had based her denial of the plaintiff's uninsured motorist claim on police reports and other "sources of information upon which the adjuster had a right to rely." The court explained that "just as a jury's determination that a claim was, in retrospect, incorrectly denied is not sufficient to establish a breach of the duty to exercise good faith, proof that a tort [breach of the duty of good faith] was committed is not sufficient to establish the right to punitive damages." *Id.* at 520.

The Mississippi Supreme Court has established a similar rule for distinguishing a denial of an insurance claim that was later determined to breach the insurance contract from the denial of an insurance claim that also merited punitive damages. *See Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 232-33 (Miss. 2001). In *Jenkins*, the court held that punitive damages are improper unless the insurer both lacked an arguable basis for denying the claim, and committed a wilful or malicious wrong or acted with gross and reckless disregard. *Id.* The court concluded that these questions are in the first instance questions of law to be decided by the trial judge. *Id.* at 233; *see also Manis v. Hartford Fire Ins. Co.*, 681 P.2d 760, 762 (Okla. 1984) (insurer's withholding of payment of claim could not lead to imposition of punitive damages where there was a "legitimate dispute" regarding evidence of arson).[3]

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[3] *See also Moffet v. Kansas City Fire & Marine Ins. Co.*, 244 P.2d 228, 233 (Kan. 1952) (holding that the "[m]ere refusal to pay insurance cannot constitute wanton or malicious conduct when, as here, an actual controversy exists with respect to liability on the policy. If this were not the rule, punitive or exemplary damages could be recovered in every action involving a refusal to pay an insurance policy."); *Jackson Nat'l Life Ins. Co. v. Receconi*, 827 P.2d 118, 134 (N.M. 1992) (finding insufficient support for punitive damages where refusal to pay on a claim for failure of condition precedent in the application was not frivolous or unfounded; "unfounded" interpreted to mean "an utter or total lack of foundation for

(continued...)

The "reasonable disagreement" standard has also been used in products liability and other types of cases in drawing the line between compensatory damages and punitive damages, and ensuring that punitive damages are not the automatic consequence of liability in tort. *See, e.g., Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (in ADA case, reversing punitive award where there was a "good faith dispute" as to propriety of employer's conduct). As shown below, the reasonable disagreement standard helps to prevent arbitrary awards of punitive damages and awards of punitive damages that punish socially useful behavior on the part of corporate defendants.

II. The "Reasonable Disagreement" Standard Should Be Applied in Assessing Reprehensibility under *BMW*

In *BMW*, as in *Danaher*, the defendant was faced with the need to determine *ex ante* whether a specific course of conduct would conform to its legal obligations, in the absence of a particular statute or judicial decision addressing that conduct. As noted above, in *BMW*, 517 U.S. at 579, the defendant car manufacturer in deciding upon a course of conduct in Alabama looked to regulations and statutes in other states and concluded that it would be reasonable to conform its conduct to the strictest of those statutes. Many other companies, including product manufacturers and insurance companies, are confronted by the same need to determine *ex ante* whether a course of conduct will conform to their legal obligations. As *Romo* and *Smith* illustrate, makers of potentially dangerous, yet necessary and useful products, such as automobiles and trucks, are confronted with this problem in a par-

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[3] (...continued)
an assertion of nonliability – an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim."); *Hoskins v. Aetna Life Ins. Co.*, 452 N.E.2d 1315, 1320 (Ohio 1983) ("[M]ere refusal to pay insurance is not, in itself, conclusive of bad faith. But when an insurer insists that it was justified in refusing to pay a claim of its insured because it believed there was no coverage of the claim, . . . such belief may not be an arbitrary or capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor" (omission in original) (citation omitted)).

ticularly acute form. Such manufacturers make product design decisions facing limits of knowledge, the necessity of trade offs in safety, the need to measure the cost of safety features or redesign of a product against the level of risk, and the need to produce a product that people can afford to buy. To ensure some level of accuracy, the assessment of the level of a defendant's reprehensibility in manufacturing a product should be based upon principles that take into account the realities of designing and marketing a product.

An assessment of reprehensibility that takes into account the "reasonable disagreement" standard leads to more reliable results in the determination of the amount, if any, of punitive damages that should be awarded. In assessing the behavior of corporate defendants under the "reasonable disagreement" principle, courts should look to whether the company's conduct complies with government standards or regulations and industry standards. In particular, where government regulations or standards govern a defendant's conduct, as is very often the case both with insurance companies and with car and truck manufacturers such as Ford, a defendant's compliance with such standards and regulations should be held (at a minimum) to create a presumption that there are grounds for reasonable disagreement as to whether the defendant acted reprehensibly in adopting that course of conduct. *See* Point III *infra*. In the case of manufacturers, courts should also look to whether there is room for reasonable disagreement as to the propriety of the design decisions, safety trade-offs and risk-utility calculations made by the company, such that the company may have reasonably believed that its conduct complied with its legal obligations toward consumers.

Some courts have persuasively applied such principles. For example, in *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995), the court vacated a $2 million punitive award that was based upon Honda's failure to incorporate leg guards on its motorcycles. The court held that Honda's "marketing its products in the same design of every motorcycle marketed in the world to the general public" was not as a matter of law so extreme or outrageous as to justify punitive damages. *Id.* at 1316. The court also noted that "[a]lthough certain studies indicate that leg guards are effective, no government in the world has ever required them," *id.*, and that

there was "a genuine dispute in the scientific community" as to the efficacy and desirability of leg guards. *Id.* at 1317.

In *Loitz v. Remington Arms Co.*, 563 N.E.2d 397 (Ill. 1990), in which the plaintiff was injured when the barrel of his gun exploded, the Illinois Supreme Court reversed a $1.6 million punitive award against the gun manufacturer. In contrast to the California court in *Romo*, the Illinois Supreme Court took a reasoned view of the role of prior accidents and litigation in showing the manufacturer's purported knowledge of dangers posed by its product. The Illinois court rejected the appellate court's view that the "detailed testimony about prior, similar occurrences which were made known to defendant before plaintiff's gun exploded" supported the punitive award, explaining:

> The 94 prior accidents represent about 0.003% of Remington's production of more than 3 million Model 1100 barrels during the span of time in question. The prior accidents must be considered not only in relation to the number of barrels produced by Remington during that period, but also in relation to the estimated number of times those guns would have been used. Although the latter number cannot be known with any precision, the plaintiff's trial testimony demonstrates that he had used his own Model 1100 shotgun literally thousands of times. *Loitz*, 563 N.E.2d at 404.

The Illinois Supreme Court in *Loitz* also rejected the appellate court's reliance upon the manufacturer's "inaction in the face of [an] earlier adverse decision" as an aggravating circumstance meriting punitive damages, stating:

> While it is true that Remington was made aware of [plaintiff's expert's] opinion during the course of the prior case, it cannot be said that Remington was automatically required to embrace Dr. Levinson's view as its own. The evidence presented at trial indicated that Remington began producing the Model 1100 shotgun in 1963 following extensive research into its design. Remington employs its own engineers and metallurgists and relies on their expertise. Various tests are performed at different stages of the

> manufacturing process to ensure the safety and quality of its shotguns. Remington's evidence demonstrated, however, that its manufacturing and testing procedures are not able to prevent every barrel explosion or rupture . . . . *Id.* at 405.

In *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994), the Iowa Supreme Court invoked the reasonable disagreement principle in upholding a directed verdict for the defendant on punitive damages. In *Hillrichs*, the plaintiff attempted to clear a plugged cornpicker while the machine was running and caught his hand in the rollers. *Id.* at 96. The plaintiff put on evidence that the defendant "knew, at the time it manufactured the husking bed, that farmers often attempted to unplug the husking rollers while they were operating" and that the defendant "could have installed an emergency stop device for less than $50." *Id.* at 97. The defendant's evidence showed that when its

> engineers decided not to install emergency stop devices on the . . . husker apparatus, they based their decision on the so called 'dependency hypothesis,' the theory that the product as designed would discourage farmers from making contact with the roller bed and that the plaintiff's proposed device would invite farmers to unreasonably depend on it despite the dangerousness of the husking roller bed.

Id. at 100. In upholding a directed verdict for the defendant on the issue of punitive damages, the Iowa court stated that "an award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue." *Id.* (citing *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993)).

In the decisions discussed above, certain recurring themes emerge from the courts' detailed examination of the corporate conduct in question. Those themes – including compliance with government regulations and the recognition of the multiple competing considerations that go into corporate decision-making – can be brought together under the general rubric of the "reasonable disagreement" standard. As shown more fully below, use of that standard in assessing a corporation's conduct under the *BMW* reprehensibility guide-

post is critical to reaching a reasonably accurate assessment of whether, as a matter of due process, punitive damages are warranted at all, and, if so, in what amount.

III. Under the "Reasonable Disagreement" Standard, a Defendant's Adherence to Government and Industry Standards Should Weigh Heavily Against Punitive Damages

In both *Romo* and *Smith*, the courts improperly discounted the fact that Ford had complied with industry and government standards. In *Romo*, as the California court acknowledged, the evidence showed that the roof strength of plaintiffs' vehicle, a 1978 Bronco, "far exceeded the passenger car standard that existed" at the time the Bronco was manufactured. (*Romo* Pet. App. at 28a.) The court acknowledged that the Bronco's roof even exceeded the "current standard" for SUVs, but dismissed this as "merely coincidental." (*Id.* at 28a-29a.) Likewise, the court gave no weight to the fact that "other auto manufacturers also used fiberglass roofs on contemporaneous fiberglass utility vehicles." (*Id.* at 36a.) In *Smith*, the plaintiff's expert admitted that "all four major American automobile manufacturers equipped their vehicles with automatic transmissions having the same design as the transmission installed by Ford" in the seventeen-year-old truck used by Tommy Smith. (*Smith* Pet. App. 41a (Cooper, J., dissenting)). Moreover, the NHTSA had concluded after an extensive investigation that "vehicles equipped with a transmission of the type installed in [the] Ford F-250 pickup truck [used by Smith] were not sufficiently unsafe to warrant recall." *Id.* at 53a.

Contrary to the decisions in *Smith* and *Romo*, compliance by a corporate defendant with government and industry standards creates a ground for "reasonable disagreement" and should weigh heavily against the imposition of punitive damages. When government agencies or an entire industry have reached the same conclusion as the defendant, it is apparent that reasonable people could reach that conclusion, and the degree of reprehensibility under *BMW* – if reprehensibility exists at all – is necessarily very low. Thus, for example, where a manufacturer defendant has made a product in compliance with government standards, such compliance "would

be admissible evidence tending to negate charges of negligent and defective design" and should "presumably weigh against an award of punitive damages." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 893 (2000) (Stevens, J., dissenting). Indeed, Professors Prosser and Keeton have stated that "compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 & n.41 (5th ed. 1984). *See also Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994) (punitive damages prohibited where defendant complied with federal safety standards).[4]

As Professor David Owen has explained:

> Many government standards . . . are adopted with studied care, and some are placed close to the line of feasible technology; others are set in a wide gray area where the difficulties of defining defectiveness (the 'proper' mix of safety and its tradeoffs) are especially great. In theses circumstances, particularly if many in the industry have come to treat the provision as the proper safety norm, proof of compliance with the regulation or statute ordinarily should be deemed to be conclusive proof of good faith and hence a conclusive defense to a punitive damages claim.

Owen, *supra*, at 41-42. *See also Welch v. Gen Motors Corp.*, 949 F. Supp. 843 (N.D. Ga. 1996) (punitive damages not warranted where automobile's braking system and instrument panel met applicable federal regulations); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699 (D. Md. 1993) (defendant who complied with federal regulation regarding product alert did not act with malice and therefore was not liable for punitive damages); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823 (Fla. 1986) (award of punitive damages is unjust where de-

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[4] Some states, by statute, bar punitive damages where the alleged wrongdoer has complied with existing government regulations. *See, e.g.*, Ohio Rev. Code Ann. § 2307.80(C) (the manufacturer of a drug will not be liable for punitive damages in a product liability claim if the drug that allegedly caused the harm was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the FDA); Or. Rev. Stat. § 30.927.

fendant had complied with requirements of National Traffic Motor Safety Act regarding fuel system integrity).

Likewise, while adherence to industry standards is not always a defense to liability in a negligence action, *see, e.g.*, *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932), it constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant punitive damages. In the insurance context, compliance with industry standards has been held to negate the culpable state of mind required for punitive damages. *See Hibler v. Conseco*, 744 N.E.2d 1012, 1022 (Ind. Ct. App. 2001) (conduct understood by insurer to be "an accepted practice within the industry" did not support "culpable state of mind" warranting punitive damages); *cf. Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo. 1985) (bad faith claim against insurer requires "proof of the standards of conduct in the industry"). In products liability cases, compliance with industry standards has been held to "show[] a reasonable disagreement over the relative risks and utilities" of a defendant's conduct in designing and manufacturing a product. *See Mercer v. Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (reversing punitive damages; defendant manufacturer's adoption of Underwriters Laboratory standard for testing and performance of smoke detectors showed that there existed grounds for "reasonable disagreement"). As one commentator has stated, "[r]arely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm." Owen, *supra*, at 40-41. Accordingly, compliance with industry custom "has been accorded substantial weight in the punitive damages context." *Id.* at 40. *See also, e.g., Drabik v. Stanley-Bostich, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind"); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (reversing denial of directed verdict on punitive damages where defendant's conduct was consistent with industry practice).

Issues regarding compliance with governmental and industry standards repeatedly arise in the insurance context. In

each of the fifty states, insurance companies are subject to comprehensive laws and regulations that govern their obligations to policyholders. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring) ("States, as a matter of tradition and express federal consent, . . . maintain[] precise and detailed regulatory schemes for the insurance industry."). Accordingly, *amici* urge that under *Danaher* and *BMW* a defendant's compliance with government regulations and industry standards should, as a matter of due process and fundamental fairness, weigh strongly against the imposition of punitive damages and should certainly preclude a punitive award of millions of dollars, such as the awards upheld in *Smith* and *Romo*.

Such compliance, whether by a manufacturer or insurance company or other corporate defendant, provides a clear marker for distinguishing between conduct that is merely tortious and conduct that merits punitive damages. By discounting evidence of compliance with government and industry standards, the courts in *Smith* and *Romo* contravened the "[e]lementary notions of fairness enshrined in our constitutional jurisprudence" that "dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Certiorari should be granted to clarify the due process constraints on punitive damages and the application of the *BMW* reprehensibility guidepost where a corporate defendant's compliance with regulations or industry standards creates "reasonable disagreement" as to the propriety of the defendant's conduct.

IV. Using Traditional Factors To Assess the Reprehensibility of Large Institutional or Corporate Defendants Produces Skewed Results and Arbitrary Punitive Awards

The need for this Court's guidance in the application of the *BMW* reprehensibility guidepost to conduct by businesses and manufacturers is demonstrated by the manifest shortcomings of the analysis provided by the courts in *Smith* and *Romo*. Those courts attempted to analyze reprehensibility by reference to traditional factors such as knowledge, recklessness, repeated conduct, physical injury and profit motivation.

Such factors, having been developed in tort cases between individuals, often do not produce constitutionally acceptable assessments of the conduct of corporate defendants. Rather, the traditional analysis does nothing to curb biases against large out-of-state corporations, encourages misunderstanding and punishment of socially beneficial behavior and produces punitive awards that are unfair, arbitrary and excessive.

The traditional reprehensibility factors are, almost by definition, present in products liability cases such as *Romo* and *Smith*. For example, the traditional "scale" of reprehensibility finds conduct that results in physical injury or death more reprehensible than conduct that results merely in economic injury. *See BMW*, 517 U.S. at 576. In products liability cases, the use of this factor automatically puts the defendant high on the reprehensibility scale. Likewise, a corporation that manufactures cars or other products whose use carries some inherent danger will likely have knowledge of the statistical likelihood (or certainty) that injuries or deaths will result from the use of its product. In litigation, such knowledge will inevitably be characterized by plaintiff's counsel as a knowing or reckless indifference to the safety of a plaintiff who is later injured by the product, again automatically placing the defendant corporation high on the reprehensibility scale. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stanford L. Rev. 547, 574 (2000). Moreover, because corporations are in business to make money, the alleged motive of the corporate defendant will always be greed. *See id.* at 566. In products liability cases, these factors will likely be present even where "reasonable disagreement" existed regarding the risks and utilities of the defendant's conduct. Therefore, in assessing reprehensibility in products liability cases, it is important to give substantial weight to the "reasonable disagreement" principle.

The analysis provided by the California Court of Appeal in *Romo* exemplifies the problems with traditional reprehensibility assessment in products liability cases. The court began its constitutional reprehensibility analysis with the proposition that because deaths had occurred in the automobile accident at issue, "the award here cannot be compared to cases 'involving a business fraud resulting only in economic harm.'" (*Romo* Pet. App. 38a.) The court determined

that Ford's conduct involving "mass production and marketing" of a product "purely for defendant's economic betterment" (*Romo* Pet. App. 38a) was "despicable" and, thus, grossly reprehensible because Ford marketed a product that "could kill people." (*Romo* Pet. App. 25a-26a.) In *Smith*, likewise, the Supreme Court of Kentucky found Ford's conduct to be substantially reprehensible because Ford continued to market its trucks "after Ford knew of the dangerous propensity of its transmission" (*Smith* Pet. App. 17a) – despite the fact that the NHTSA had decided not to recall the vehicles and that all four major American manufacturers used the same transmission design.

Jurors' sympathies and cognitive biases compound the risk that punitive awards in products liability cases will be skewed. Where injuries are severe, juries may be reluctant to blame the injured, preferring in the case of a car accident, for example, to blame the car rather than the driver. Furthermore, it is easy for plaintiff's lawyers to demonize large, out-of-state corporations, and jurors' "natural sympathy for a seriously injured person" may be "reinforced when the defendant is a manufacturer, for many persons are hostile toward major institutions in general and 'big business' in particular." Owen, *supra*, at 12.[5] Thus, it is not surprising that, as jury research has shown, juries tend to punish corporations simply for having conducted a risk analysis. *See* Viscusi, *supra*, at 559 (mock jury research showed that "[u]ndertaking a benefit-cost analysis of risk does not help the company, but instead boosts the punitive damages awarded by 47%."). In addition, what a jury may view as a significant number of prior, repeated incidents evidencing knowledge and recklessness warranting a

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[5] *See also* Ellis, *supra*, at 42 ("In the emotionally charged context of a civil trial, which lacks the procedural safeguards of a criminal proceeding, where the jury is invited to assess punitive damages with little guidance and less constraint, decisions will be affected by latent biases or redistributional inclinations. If juries dislike or do not understand cost-benefit analyses, [or] distrust corporations, . . . those factors are likely to bias their decisions."). Notably, in his dissenting opinion in *Smith*, Justice Cooper of the Kentucky Supreme Court characterized the punitive award in that case as "an outrageous verdict" by a "runaway jury" that would "redistribute the wealth of an out-of-state corporation with requisite deep pockets." (*Smith* Pet. App. 32a.)

large punitive award, may in fact involve only a tiny percentage of the numbers of products sold and being used uneventfully by millions of consumers. *See, e.g.*, *Loitz*, 563 N.E.2d at 404 (vacating punitive award; stating that 94 prior accidents represented only 0.003% of 3 million gun barrels).

The weighing of costs and benefits or risk and utility by a manufacturer in making design decisions is desirable, socially beneficial conduct that should be encouraged, not punished. Viscusi, *supra*, at 550 ("we want corporations to think about risks in a systematic manner."). Basing punitive damages liability on the defendant's knowledge through cost-benefit analysis of the risk of injury has a "perverse effect on incentives," reducing the "resources committed to ascertaining the relative harm that would result from alternate product designs and to exploring means of reducing expected loss," thus, "deter[ring] the very activities that efficient liability rules promote." Ellis, *supra*, at 50.[6] *See also In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (noting danger of deterring "good conduct that risks being misunderstood as bad, or that will look bad in retrospect").

Many competing factors are considered in designing a product, and while safety is important, manufacturers of products "must also consider elements such as marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Prod. Liab. Litig.*, 74 Ky. L.J. 1, 88-89 (1985). Ultimate safety is not economically feasible, either from the manufacturer's viewpoint or from the viewpoint of the consuming public. Cars cannot be manufactured like tanks, and safety trade-offs, although

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[6] Likewise, in the insurance context, the too ready imposition of punitive damages may result in deterring reasonable investigation of invalid or fraudulent claims. *See, e.g., Savio*, 706 P.2d at 1275; Alan O. Sykes, *"Bad Faith" Breach of Contract by First-Party Insurers*, 25 J. Legal Stud. 405, 434-35 (1996) (noting "rampant" insurance fraud and stating: "[i]f reasonable efforts to reduce fraud can become 'bad faith' down the road, . . . insurers may simply give up on them"). The "reasonable disagreement" standard helps strike a balance between competing social considerations in both the products liability and the insurance contexts.

not palatable to juries, are necessary. The costs of avoiding all risk of harm are "potentially infinite," and requiring a manufacturer to bear them or face a huge punitive award will simply mean that "society would lose the benefit of the productive activity." *Exxon Valdez*, 270 F.3d at 1244.

Problems of hindsight create a further potential for excessive punitive awards, when juries and courts examine a manufacturer's risk-utility decisions. Juries and courts, assessing a defendant's reprehensibility after the fact of an accident, do not necessarily "compare expected benefits and costs based on the state of information before the accident." Viscusi, *supra*, at 563.[7] Rather, "jurors may compare the enormous cost to the victim with the relatively negligible cost of the safety improvement." *Id.* However, although the cost of a single "fix" for each car or other product may seem low, "at the time of design, the fix was merely one of a great many options considered for inclusion in the total design mix, and . . . human injury from any one was at most at that time only a foreseeable risk." Owen, *supra*, at 35. With respect to car design in particular, there are "hundreds of design changes that can be made to enhance the safety of [a] vehicle . . . ranging in cost per unit from pennies to hundreds of dollars. Although the cost of any one change may be small in isolation, all [that can be] fairly ask[ed] of management and its engineers in the punitive damages context is that safety considerations not be deliberately excluded or shunted far to the rear in deciding on the total design mix involved." *Id.* at 34.

Moreover, cost-benefit analysis, by its very nature, produces "bad" documents – that is, documents that acknowledge the existence of safety risks. In fact, "the more a manufacturer is truly concerned about its product's safety, the more

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[7] Empirical jury research confirms the serious effect of hindsight bias on jury determinations of punitive damages. *See* Cass R. Sunstein, *et al.*, *Punitive Damages: How Juries Decide* 96-107, 211, 222 (2002). Hindsight bias exists in insurance litigation as well. *See, e.g.*, James M. Fischer, *Should Advice of Counsel Constitute a Defense for Insurer Bad Faith?*, 72 Tex. L. Rev. 1447, 1485 n.90 (1994) ("Hindsight bias reflects the tendency of decisionmakers to find that what did occur should have been foreseen . . . . In an insurance bad faith case involving an excess verdict, the fact of the verdict influences the decisionmaker's perception of the probability of the excess verdict.").

it will encourage self-criticism and 'negative' analyses of the product within the company." Owen, *supra*, at 17.[8] Thus, "in the documentary background of most inherently dangerous products will be some fair number expressing concern over many of the significant choices in the design process." *Id.* The result in later litigation is that "[a] skillful plaintiff's lawyer will often be able to find and string together a series of such documents, plucked from context among the thousands or millions in the company's files, that may make the manufacturer look particularly insensitive to consumer safety and more concerned about cutting costs." *Id.* at 19.

Accordingly, in evaluating such documents for purposes of punitive damages, it is important that courts be aware of the realities of the design process and, in particular, the reality that manufacturers of products such as automobiles "must design them in many different ways they know with virtual certainty will result in harm or death at some time to a certain number of unfortunate, statistical persons." *Id.* at 15. In *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986), the Florida Supreme Court distinguished such knowledge from the knowledge of an asbestos manufacturer. In assessing the "reprehensibility" of a car maker's design and placement of a fuel tank, the court emphatically rejected the proposition that the car manufacturer could be equated to an asbestos manufacturer who had been "shown to have knowledge that its product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death, but nevertheless continues to market the product . . . ." *Id.* (refusing to follow *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242 (Fla. Dist. Ct. App. 1984)). The Florida Supreme Court held that the *Johns-Manville* "standard [was]

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[8] In *Smith*, in assessing reprehensibility, the Kentucky court stressed a document by a Ford engineer that identified the purported defect in the transmission and purportedly "recommended an alternative." (*Smith* Pet. App. at 14a, *but see id.* at 37a-42a (opining that Ford was entitled to directed verdict on issues of causation and defect) (Cooper, J., dissenting)). Notably, that document recommended not an existing alternative but that "design and development be directed toward" an alternative. (*Id.* at 14a n.24.) Likewise, the California court relied upon various corporate documents, including a "corporate memo" apparently advocating consideration of a stronger roof strength standard. (*Romo* Pet. App. at 26a.)

clearly erroneous when applied to a claim that a motor vehicle was insufficiently crashworthy when precautions had been taken to insure its crashworthiness." *Id.* at 826.

The Florida Supreme Court's opinion in *Wolmer* stands in stark contrast to the opinions of the courts in *Smith* and *Romo*. Indeed, in upholding punitive damages against Ford in the *Smith* case, the Kentucky Supreme Court chose to follow a case in which punitive damages were assessed against an asbestos manufacturer and in which the Kentucky Supreme Court had held that asbestos defendants were not insulated from liability by industry practice "just because every member of that industry was manufacturing and distributing a product known to be inherently dangerous." (*Smith* Pet. App. at 17a & n.38.) The Kentucky court ignored Kentucky precedent holding the manufacturer of an auger not liable even for compensatory damages where the auger "conformed to the design as to safety developed by the industry," despite the "occurrence of other injuries." *See Jones v. Hutchinson Mfg. Inc.*, 502 S.W.2d 66, 70-71 (Ky. App. 1973). The Florida Supreme Court in *Wolmer* was correct, and the Kentucky Supreme Court in *Smith* was wrong. The manufacture of a car or truck conforming to government and/or industry standards cannot rationally be equated to the manufacture of asbestos.

Under the "reasonable disagreement" standard, the fact that a manufacturer has based its design decisions on a risk analysis should weigh against punitive damages, even if a particular design decision turns out to have been wrong or unwise such that compensatory damages for the injured product-user are in order. That conclusion is mandated not only by the "reasonable disagreement" standard, but also by the considerations of due process and fundamental fairness upon which this Court's decision in *BMW* is based. This Court should grant certiorari to clarify the contours of the due process limitations on punitive damages in products liability, insurance, and other cases against corporate defendants.

CONCLUSION

The petitions for certiorari should be granted.

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In The Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

JUAN RAMON ROMO, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

BRIEF OF AMICUS CURIAE MERCEDES-BENZ USA, LLC IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Mercedes-Benz USA, LLC ("MBUSA") is a U.S. importer and distributor of Mercedes-Benz automobiles.[1] Mercedes-Benz automobiles have long enjoyed a reputation for pioneering safety technology. For example, Mercedes-Benz automobiles were the first to offer, or to offer as standard equipment, features such as

- Safety door locks (1949)
- Safety body with "crumple zones" (1951)
- Seat belt anchor points as standard equipment (1961)
- Collapsible steering wheel columns (1967)
- Safety head restraints (1968)
- Three-point seat belts (1968)
- ABS antilock braking system (1978)
- Supplemental restraint system consisting of driver airbag, seat belt pretensioners and knee bolsters (1981)
- Passenger front airbag (1988)
- Side-impact airbag (1995)
- Electronic stability program (1995)
- BabySmart child safety seat recognition system (1997)
- Head curtain window airbag (1998)

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by Mercedes-Benz USA, LLC and was written entirely by its counsel.

Christof Vieweg, HIGHLIGHTS OF AUTOMOTIVE TECHNOLOGY: EVERYTHING ABOUT MERCEDES PASSENGER CARS 21-23 & *passim* (1999). Many of these features appeared in Mercedes-Benz vehicles well before they appeared in the vehicles of other manufacturers, and some of this technology remains unique to Mercedes-Benz vehicles. *Id.*

Nonetheless, like Ford and other automobile companies, MBUSA faces a constant risk of new products liability lawsuits throughout the United States. Plaintiffs frequently seek punitive damages. They allege that their automobile should have had a safety feature it did not have, or that it had a safety feature it should not have had, or that a safety feature did not do what it should have, or even that the safety feature failed to do something it was never intended to do.

MBUSA, like many others who manufacture or sell products, is vitally concerned that there be rational guidelines for punitive damage awards; otherwise such awards threaten to "punish" in an extraordinary manner any defendant unlucky enough to draw an impassioned jury – or appellate panel. Where appellate courts refuse to intervene in the face of such an enormous award – as the California Supreme Court did here – or, even worse, where an appellate court actively intervenes to reinstate such an award that was thrown out by the trial judge – as the California Court of Appeal did here – there is a desperate need for constitutional guidance by this Court.

SUMMARY OF ARGUMENT

Corporate defendants must frequently rely on appellate courts to invoke the rule of law when runaway juries fashion outlandish punishments for perceived misdeeds. Trial judges are often unwilling, or feel too constrained, to rectify the problem. Here, to the contrary, the trial court attempted to correct an improper result that it perceived to be the result of jury misconduct, passion and prejudice, by ordering a new trial. It was instead a runaway appellate court that reinstated and endorsed an unprecedented $290 million punitive award. In doing so, the

appellate court brushed aside constitutional considerations identified by this Court that the California court simply felt did not apply to personal injury actions.

The *Romo* court's reasoning is particularly troubling to companies like MBUSA selling products to the public that involve cutting edge technology, often with inherent safety tradeoffs. Although Mercedes-Benz vehicles lead the field in safety technology, their manufacturer or distributor should not be exposed to a heightened risk of a jury finding that they consciously modified, or failed to modify, their product in a way that they allegedly knew created risks to certain users. Yet the *Romo* appellate court's reasoning, which the California Supreme Court left intact, holds that the United States Constitution has little if any role to play in protecting such a manufacturer or distributor from potentially enormous punitive liability for decisions that, in other contexts, bring them praise as industry leaders.

As Ford's petition explains, the *Romo* court is not the only court to take the limited view that this Court's precedents on the constitutionality of punitive damages apply only to, or differently in, cases involving pure economic harm. Pet. 10-11. *See also Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *pet. for cert. pending sub nom. Ford Motor Co. v. Estate of Tommy Smith*, No. 02-1096 ($15 million punitive damages verdict in products liability case reinstated by Kentucky Supreme Court, which rejected due process arguments that verdict was excessive because, among other things, "[i]t would be impossible to overstate the degree of harm" to decedent).

Although nothing about their reasoning suggests that the Court meant to draw a line between economic loss and personal injury in identifying due process limitations on punitive damages, the Court apparently needs to make clear that due process considerations apply with equal force to all punitive damages awards. Otherwise, we will continue to see decisions like *Romo*, and this Court will continue to see petitions for certiorari spawned by ever more enormous punitive awards.

THE *ROMO* DECISION

Romo is a products liability case involving a 1978 Ford Bronco, purchased used in 1992, that rolled over on the highway in 1993 while the driver was attempting to avoid collision with another vehicle. Pet. App. 2a. Three occupants of the Ford truck were killed and three were injured. *Id.* Plaintiffs sued Ford, alleging that Ford improperly designed the roof so that it failed to adequately resist the crush forces in this accident. *Id.* at 26a-28a.

It was undisputed that, at the time the plaintiffs' vehicle was manufactured, there were no federal regulations requiring a stronger roof. Pet. App. 26a. It was also undisputed that, when the federal government instituted roof strength standards several years later, this vehicle would easily have passed those standards. *Id.* It was also undisputed that other manufacturers at the time (indeed almost all) used similar roof construction designs and that there remain many vehicles on the road designed to be driven with no roofs at all (i.e., convertibles), and which do not have roll bars or any other device designed to protect the occupants in a rollover crash. *Id.* at 29a-30a. Finally, it was undisputed that, even though these vehicles have been on the road for more than two decades, Ford has never been "penalized in any case for [sic] punitive damages arising from the design of the 1978-1979 Bronco." *Id.* at 36a.

The jury nevertheless ultimately held Ford liable, returning a verdict for approximately $6 million in total compensatory damages and a whopping $290 million in punitive damages. Pet. App. 3a. The vote to award punitive damages was 9 to 3 – the minimum necessary. *Id.* at 10a. Juror declarations obtained after the verdict strongly suggested that two of the jurors were influenced to vote for punitive damages based on information they had acquired outside the courtroom. *Id.* at 6a-8a. In one case it was information she had heard second-hand about a "60 Minutes II" program concerning fires in Ford Mustangs. *Id.* at 6a-7a. In the other case it was a dream, among other things, that persuaded her that "saving babies was more important [than] the need to follow the law." *Id.* at 7a-8a.

Based on these affidavits and his experience presiding over the entire trial, the trial judge granted Ford's motion for a new trial. Pet. App. 10a-11a. The trial judge found that "[j]uror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case and a refusal to follow the law." *Id.* at 10a. The trial court noted the borderline 9-3 vote on "malice" and pointed out the very high "clear and convincing evidence" standard for imposing punitive damages. *Id.*

The California Fifth District Court of Appeal reversed the trial court and reinstated the jury's punitive damages award. Pet. App. 2a. Acknowledging the misconduct of the two jurors in question, the court found this bias cured by the trial court's and jury foreperson's admonitions to follow the law. *Id.* at 19a-20a. As to the $290 million punitive damage award, the court characterized the evidence as establishing that Ford, as an institution, must have been aware of the shortcomings of the 1978 Ford Bronco roof, and that corporate failure to act on that awareness constituted "malice." *Id.* at 22a-32a.

The court was untroubled by the size of the award, rationalizing it largely on the grounds that Ford is "a huge company with enormous monetary resources." *Id.* at 36a. In an attempt to distinguish this Court's jurisprudence on punitive damages, the California court asserted that "the award here cannot be compared to cases 'involving a business fraud resulting only in economic harm.'" *Id.* at 38a. According to the California court, Ford's conduct was particularly "reprehensible" because it "involved mass production and marketing of the dangerous vehicle purely for defendant's economic betterment." *Id.*

Ford sought discretionary review by the California Supreme Court. By a 4-3 vote, that court refused to even consider whether there was something fundamentally wrong with this unprecedented California verdict. Pet. App. 47a.

WHY THE PETITION SHOULD BE GRANTED

Something radically wrong happened at this trial, and the California appellate court, rather than affirming the trial judge's corrective order, instead became a partner in the jury's reckless folly. A decision like this in *Romo* will only further discourage trial judges from seeking to remedy plainly excessive jury awards. All of corporate America, and many individual citizens as well, must fear the implications of verdicts like this, which threaten severe liability for decisions that, in other contexts, would be viewed as entirely appropriate and often highly beneficial. This is the problem faced by companies like MBUSA, which use advanced safety technology that saves many lives and prevents serious injuries, but that also sometimes has inherent risks.

A. *Romo* Threatens Corporate Defendants with Potentially Unlimited Punishment Even for Innovative Safety Technology

Companies like MBUSA, which pride themselves on the innovative nature of the products they sell, are particularly at risk that a jury, and indeed even an appellate court, will view such innovations as evidence of "conscious disregard" for the safety of consumers. This is so whether the innovative change fails to prevent injury or arguably harms someone. Plaintiffs will even argue that an innovative change serves as evidence the defendant "consciously disregarded" consumer safety by not introducing the innovation earlier. Note that the *Romo* appellate court specifically cited Ford's subsequent strengthening of the Bronco roof as evidence supporting the huge punitive damages award because it demonstrated that Ford was aware its earlier vehicle was "structurally inadequate" but did nothing to "remedy" this inadequacy in earlier model vehicles. Pet. App. 35a.

Airbag technology is the perfect example. Mercedes-Benz vehicles were technological and market leaders in the field of airbags. They began to include driver's side front airbags in production vehicles in 1981, becoming standard equipment in all Mercedes-Benz vehicles by 1992. Vieweg, HIGHLIGHTS OF

AUTOMOTIVE TECHNOLOGY at 22. This was well before airbags were first required by the National Highway Traffic Safety Administration ("NHTSA") in the late 1990's. 49 C.F.R. § 571.208 S4.1.5.3. Mercedes-Benz vehicles have continued to add new and innovative airbag technology, without being required to do so, including passenger airbags, side airbags in the front and rear seats, and head curtain airbags that come down from the ceiling. Vieweg, *supra.*

Like many components in motor vehicles – and indeed in many products generally – airbags involve a safety tradeoff. Airbags have been proven to save many lives and to prevent serious injuries, and that is why NHTSA now requires them in all U.S. passenger vehicles. 49 C.F.R. § 571.208 S4.1.5.3 (requiring driver and front passenger airbags in model year 1998 vehicles). But airbags do not always prevent injury, and in certain circumstances they can themselves injure and even kill people. There is no way to eliminate these risks while maintaining the ability of airbags to do their job. NHTSA is well aware of these risks and has made a conscious decision to require airbags in vehicles despite their dangers. *See* Federal Motor Vehicle Safety Standards, Occupant Crash Protection, 65 Fed. Reg. 30680, 30681 (May 12, 2000) ("As of April 1, 2000, NHTSA's Special Crash Investigation (SCI) program had confirmed a total of 158 fatalities induced by the deployment of an air bag."); Air Bag On-Off Switches, 62 Fed. Reg. 62406, 62425 (November 21, 1997) (discussing "the safety benefits, risks and tradeoffs associated with air bags").

Nonetheless, like other motor vehicle manufacturers and distributors, MBUSA has been sued for injuries allegedly related to airbags. On the one hand, the plaintiff might allege that the airbag was defective because it failed to deploy, and that the injury would and should have been prevented by the airbag. On the other hand, the plaintiff might claim that he or she was injured because the airbag did deploy, and that the injury would have been prevented if the airbag had been designed to deploy differently, or if the vehicle did not have an airbag. MBUSA is particularly at risk for the last

type of claim because Mercedes-Benz vehicles had airbags long before they were required.

B. The *Romo* Decision Allows Massive Punitive Damages Even If No Particular Individual Ever Made a "Malicious" Decision

Indeed, the California Court of Appeal's decision did not even require evidence that anybody in particular made a "malicious" decision on behalf of the corporate defendant to include or not include safer technology. According to the court, "maliciousness" can be attributed to a corporation even if no one in charge of the corporation is ever shown to have acted wrongfully. The court admitted there was no evidence in *Romo* that any "particular committee or officer of the corporation acted on a particular date with 'malice.'" Pet. App. 24a.

The court nonetheless held that a plaintiff may satisfy the "managing agent" requirement of California Civil Code section 3294(b) through "evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated." Pet. App. 25a. The court regarded Ford as a "fictional monolith," explaining that it had difficulty imagining "how corporate malice could be shown in the case of a large corporation except by piecing together knowledge and acts of the corporation's multitude of managing agents." *Id.*

This utterly amorphous standard excused the plaintiffs from proving any actual malice on the part of anyone, and instead allowed the jury to award punitive damages because it concluded that "the design and production of the [product] was the despicable conduct." Pet. App. 25a. Especially where jurors are free to consider the punitive issue in light of television programs and stories of nightmares, and trial judges are instructed that they should deny new trials despite such flagrant misconduct, the *Romo*

malice standard threatens to lift any due process limitations on punitive damages, at least where personal injuries are involved.

Those who sell trendsetting safety technology – like MBUSA – should not have to worry that their efforts to improve safety might result not just in unwarranted liability, but also in multi-million or even billion dollar punitive awards. Yet the *Romo* decision offers a roadmap for reaching precisely this result.

C. This Court Should Clarify that Fundamental Constitutional Protections Bar Outrageous Punitive Awards Like that Permitted Here

The California appellate court's opinion is inconsistent with all that this Court has recently taught regarding assessment of the constitutionality of punitive damage awards. *See BMW of North America, Inc. v. Gore*, 517 U.S. 560 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). While insisting that Ford's conduct was "reprehensible" – despite Ford's compliance with industry and government standards – the California court improperly dispensed with the two *BMW* factors that inconveniently militated against the award's constitutionality.

First, the disparity between the punitive and compensatory award (even before it was reduced by the trial court) was enormous – a 59:1 ratio – and the court of appeal acknowledged that this factor "weigh[ed] in favor of excessiveness." Pet. App. 39a. But it chose to ignore this reality, asserting that "wrongful death compensatory damages do not fully reflect the harm to the victims," *id.* – as if this Court might not have anticipated, when it formulated its factors, that wrongful death cases offered one likely context for their application.

Second, the court deemed a "comparison with civil fines for similar conduct" to be inappropriate, claiming that (1) this factor should only apply when the conduct, if committed by an individual, could *not* result in imprisonment, while (2) Ford's

conduct, if committed by an individual, "could result in substantial imprisonment." Pet. App. 39a. No such concepts are found anywhere in this Court's jurisprudence; indeed, the Court specifically held in *BMW* that the automotive distributor should not have been subjected to "a punitive sanction that is *tantamount* to a severe criminal penalty." *BMW of North America v. Gore*, 517 U.S. at 585 (emphasis added).

The California court's constitutional analysis was seriously deficient and apparently driven by an agenda to reinstate an outrageous award. If left standing, it encourages other like-thinking courts to permit similar injustices, paying nothing more than lip service to this Court's constitutional jurisprudence on punitive damages.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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FORD MOTOR COMPANY,

Petitioner,

vs.

JUAN RAMON ROMO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The Fifth Appellate District

BRIEF OF TWENTY LEADING NON-AUTOMOTIVE COMPANIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are twenty leading non-automotive companies that represent a wide spectrum of American businesses. Many of the *amici* are manufacturers, engaged in the production of agricultural supplies, aircraft, chemicals, cigarette lighters, consumer glass products, diesel engines, earthmoving and construction equipment, first aid supplies, garbage trucks, home appliances, industrial equipment, medical devices, personal hygiene products, personal watercraft, pharmaceuticals, pens, plastic products, sporting goods, and truck trailers. Other *amici* are involved in oil and gas exploration, transportation and disposal of hazardous materials, and interstate rail freight transportation. Collectively, the *amici* provide goods and services that are indispensable to consumers and beneficial to the public welfare. Therefore, *amici* are particularly well-suited to explain how the issues presented impact the entire business community.

As the detailed descriptions of the individual companies set forth in the attached Appendix A show, *amici*'s activities are performed in compliance with a wide array of voluntary industry standards and mandatory government regulations. For example, the manufacturing *amici* design and produce their products in accordance with industry customs and standards such as those set by the American National Standards Institute, and in compliance with a

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[1] This brief is submitted with the consent of counsel for all parties. It was authored by *amici* and counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici* or their counsel made any monetary contributions to the preparation or submission of this brief.

complex array of state and federal regulations promulgated by, inter alia, the Consumer Product Safety Commission, the Food and Drug Administration, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Highway Traffic Safety Administration. The non-manufacturer *amici* are similarly engaged in activities such as oil and gas exploration or the transportation of hazardous materials that are subject to extensive environmental laws and regulations. *Amici*'s activities, by their very nature, carry the potential for serious personal injury, despite *amici*'s best efforts to maximize their safety.

Amici believe that the issues raised in Ford's petition in this case ("*Romo*"), and in the companion case of *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *petition for cert. filed sub nom. Ford Motor Co. v. Estate of Tommy Smith*, No. 02-1096 (U.S. Jan. 21, 2002) ("*Smith*"), affect not only the automotive industry, but all businesses whose activities can potentially cause serious injury. Specifically, *amici* believe that the reasoning of the lower courts in *Romo* and *Smith* conflicts with the reasoning of other opinions and severely undermines the due process protections against excessive punitive damages set forth by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996) ("*BMW*").

SUMMARY OF ARGUMENT

The petition in this case, along with the contemporaneously filed petition in *Smith*, explains that the lower courts in both cases effectively nullified the three-guidepost test set forth in *BMW* for reviewing constitutionally excessive

punitive damage awards. *Amici* agree that all the issues raised in the petition merit this Court's attention. The purpose of this brief is to stress two of those issues.

First, *amici* emphasize the importance of the petitioner's argument concerning the proper interpretation of the first *BMW* guidepost: the reprehensibility of the defendant's conduct. Both in *Romo* and in *Smith*, the lower courts reasoned that Ford's conduct was highly reprehensible *per se* because Ford knowingly manufactured a product that could cause serious injury. The lower courts failed to consider important aspects of Ford's conduct that supported Ford's good faith belief that its conduct was lawful. For example, the courts criticized Ford's product design decisions, but disregarded the fact that Ford complied with applicable regulations and industry standards. And the courts criticized Ford for failing to change or recall its products, but disregarded evidence that supported Ford's determination that no change or recall was necessary, such as the absence of any injuries despite years of use (*Romo*), or findings of no defect by prior juries and the National Highway Traffic Safety Administration (*Smith*).

A company that complies with all applicable regulations and industry standards should have some assurance that its conduct will not be deemed highly reprehensible, even if a jury later determines in hindsight that the company is liable for a personal injury. This is especially true in cases where the company operates in a highly regulated environment. The mere occurrence of injury should not be an indicium of reprehensibility. Instead, the focus should be on the defendant's state of mind when the conduct occurred.

As this brief explains, however, companies like the *amici* are constantly faced with the threat of punitive damages under these or similar circumstances. *Amici* respectfully request that this Court grant certiorari and resolve a conflict in the lower courts regarding the proper application of the first *BMW* guidepost. Specifically, *amici* ask this Court to hold that, when applying the first *BMW* guidepost, courts must consider *all* factors bearing on the reprehensibility of the defendant's conduct, including facts showing a good faith basis for the defendant to believe its conduct was lawful.

Second, *amici* emphasize the importance of petitioner's argument concerning the third *BMW* guidepost: comparison of the punitive damage award to statutory civil and criminal penalties for comparable misconduct. This Court explained in *BMW* that reviewing courts should accord "substantial deference" to statutory penalties because they constitute legislative determinations of the appropriate sanctions for misconduct. Nonetheless, as the petitions explain, the lower courts in *Romo* and *Smith* declined to compare each punitive damage award to the applicable statutory penalties for similar misconduct. The *Romo* court declared the third *BMW* guidepost inapplicable because Ford's conduct arguably was punishable by imprisonment. The *Smith* court looked only to other punitive damage awards instead of deferring to *legislatively* established penalties.

Amici will demonstrate that giving the third *BMW* guidepost short shrift is a national trend reaching epidemic proportions. Appendix B to this brief compiles information about federal and state appellate cases applying *BMW* to punitive damage awards of $1 million or more. Appendix B demonstrates that courts are routinely

affirming multi-million dollar punitive damage awards without giving any weight to *BMW*'s third guidepost.

Amici respectfully request that this Court grant certiorari and end the pervasive disregard of the third guidepost. Specifically, *amici* ask this Court to explain that courts cannot disregard the third guidepost when legislatively established penalties for comparable misconduct are small or non-existent. To the contrary, in such cases, courts should treat the third guidepost as a meaningful limitation on the size of a punitive damage award, because the applicable statutory penalties afforded no fair notice of a massive monetary sanction.

STATEMENT OF THE CASE

Amici hereby adopt and incorporate by reference the Statement of the Case set forth in Petitioner's Brief.

ARGUMENT

I.

THE MISAPPLICATION OF *BMW*'S "REPREHENSIBILITY" GUIDEPOST EXPOSES BUSINESSES TO ENORMOUS PUNITIVE DAMAGE CLAIMS AND AWARDS.

In both *Romo* and *Smith*, the lower courts failed to meaningfully apply the first *BMW* guidepost: the degree of reprehensibility of Ford's conduct. Instead of examining Ford's actual conduct in choosing a particular product design, the courts simply observed that Ford knowingly made a product with a potential for causing serious injury,

and concluded that this conduct was sufficiently reprehensible to support an enormous punitive damage award.

Amici are deeply concerned by the reprehensibility discussion in *Romo* and *Smith*. As explained more fully in the *amici curiae* brief filed by the Product Liability Advisory Council, et al., *Romo* and *Smith* confuse intentional conduct (intentionally manufacturing a product that is involved in an injury) with intentional harm (intentional injury), thereby exposing all companies whose activities may cause personal injury to enormous punitive damage awards. Many of the *amici* are manufacturers who make a wide variety of products, both for individual and industrial consumers. Most of these products, by their very nature, carry the potential for personal injury. When a product is sold to millions of consumers, even the tiniest probability of injury may result in a large number of injuries. The National Safety Council's annual publication of injury information in the United States reports literally thousands of annual injuries associated with such everyday products as shoes, coins, luggage, skateboards, sleds, hand saws, hammers, drills, pliers, wire cutters, wrenches, screwdrivers, batteries, household containers and packaging, bottles, jars, tableware, scissors, trash baskets, beds, tables, chairs, ladders, rugs, toilets, mirrors, bathtubs, showers, nails, screws, windows, refrigerators, irons, vacuum cleaners, and fans. National Safety Council, Injury Facts 134 (1999 ed.).

Other *amici* are not manufacturers, but similarly engage in activities that, although beneficial, have the potential for causing personal injury, such as oil and gas exploration and the transportation of hazardous materials. If merely manufacturing a product or engaging in an activity with a potential for causing serious injury is, in

and of itself, highly reprehensible, then the *BMW* reprehensibility guidepost will never constrain excessive punitive damage awards in cases against companies like the *amici*. They will be vulnerable to enormous punitive damage awards whenever serious injury occurs, despite the impossibility of making any product injury-proof in all circumstances of use, and despite manufacturers' inability, once they have sold a product, to control the circumstances of use.

Amici believe that *Romo* and *Smith* merit this Court's review because they are extreme examples of the disregard of the reprehensibility guidepost. Not only was there no showing of conscious disregard for safety, but the lower courts ignored *multiple* circumstances showing diminished or no reprehensibility. First, with respect to Ford's product design, the courts ignored Ford's compliance with industry customs and regulatory safety standards. Second, with respect to Ford's alleged failure to change or recall its products, the courts ignored the fact that the product was widely used with no evidence of other injuries (*Romo*), and the fact that juries and administrative bodies had found the product not defective (*Smith*). The evidence affirmatively indicated that Ford, like the defendant in *BMW*, had a good faith basis for believing its conduct was lawful. *See BMW*, 517 U.S. at 576-79.

Although *Romo* and *Smith* are extreme examples, they are not the only examples. *Amici* constantly face cases in which they are subjected to or threatened with punitive damages under some of the same circumstances.

For example, in 1997, *amicus* CSX Transportation ("CSXT") was assessed with a then-unprecedented *$2.5 billion* in punitive damages by a New Orleans jury in

connection with a tank car fire that occurred after the car was left at CSXT's facility. CSXT's allegedly "reprehensible" conduct was its failure to discover that the tank car was leaking a combustible substance. However, in affirming a remitted $850 million punitive damage award, the Louisiana Court of Appeal gave no weight at all to the undisputed evidence that CSXT's tank car inspection practices conformed with all federal and other legal requirements, were fully consistent with industry standards of good practice, had never resulted in a tank car accident at the facility except for the accident at issue, and that CSXT had been commended by the New Orleans City Council for its conduct in connection with the fire. *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 373, 375 (La. Ct. App. 2001), *petition for cert. dismissed per stipulation*, Louisiana Supreme Court No. 2001-C-2485.

ExxonMobil recently was assessed *$1 billion* in punitive damages in a case involving a parcel of land that allegedly was contaminated with a naturally occurring radioactive byproduct of oil drilling. *See Grefer v. Alpha Technical*, No. 97-15004 (La. Civ. Dist. Ct.). The Louisiana Department of Environmental Quality determined that there were no emissions of radioactive materials in the air or ground, and that the site was not a hazard to neighborhood residents, but the jury awarded $1 billion and the trial court denied ExxonMobil's posttrial motions. That case is currently pending on appeal in Louisiana state court. The award should be reversed under a proper application of *BMW*, but ExxonMobil is concerned that the reasoning of *Romo* and *Smith* could undermine the due process protections set forth in *BMW*.

In *Waddill v. Anchor Hocking, Inc.*, 27 P.3d 1092 (Or. Ct. App. 2001), *petition for cert. filed*, No. 02-370 (U.S. Sept. 3, 2002), Anchor Hocking was assessed $1 million in punitive damages for failing to warn that a glass fishbowl might break. *Id.* at 1093-94. In reviewing the award under *BMW*, the Oregon Court of Appeals discussed that Anchor Hocking had never received any civil or criminal punishment relating to its manufacture of fishbowls. *Id.* at 1098-99. (The court did not discuss that no civil or criminal penalties exist for the conduct at issue and that the nearest comparable penalties are small.) This should have led the court to conclude that Anchor Hocking neither deserved punishment nor had fair notice of a $1 million punishment; instead, as in *Romo*, the court cited the absence of any civil or criminal punishment as grounds for *affirming* the award. *Id.*

Other *amici* have been threatened with enormous punitive damages in cases involving some of the same elements appearing in *Romo* and *Smith*. For example, Whirlpool recently was sued for an alleged defect in a dishwasher that supposedly caused a fire. The suit sought punitive damages, even though the dishwasher complied with all industry and Underwriters Laboratory standards and was subjected to extensive preproduction and production testing. *See Trinidad v. Whirlpool Corp.*, No. CIV 00-1435 (D. N.M.). Great Dane Trailers faces one punitive damage lawsuit after another alleging that the rear impact guards on its truck trailers are either too strong or not strong enough, even though the guards comply with National Highway Traffic Safety Administration regulations, as well as voluntary industry safety guidelines. *See, e.g., Rapp v. Singh*, 152 F. Supp. 2d 694, 696-98 (E.D. Pa. 2001). Bombardier, Inc. repeatedly faces punitive damage lawsuits alleging that the steering systems on its personal

watercraft are defective, even though those systems fully comply with U.S. Coast Guard safety requirements. *See, e.g., Barnett v. Bombardier, Inc.*, No. 00-5726-L (Tex. 9th Jud. Dist.). These companies have prevailed in these cases thus far, but they face the prospect of successive lawsuits based on the same kinds of allegations, and will be at perpetual risk of punitive damages under *Romo* and *Smith*.

Some of the *amici* are pharmaceutical companies concerned about the threat of enormous punitive damages for alleged defects in drugs, even though the drugs have been subjected to extensive testing and have been approved by the Food and Drug Administration. Such lawsuits include the recent claim for $560 million in compensatory and punitive damages against Bayer for alleged defects in the anticholesterol drug Baycol. *See* Melody Petersen, *Bayer Cleared of Liability in a Lawsuit Over a Drug*, N.Y. Times, Mar. 19, 2003 at C1. A jury cleared Bayer of all liability, but the mere possibility that a $560 million award *could* be imposed and upheld caused Bayer's stock to drop over thirty-seven percent. *Id.* Despite Bayer's win, the plaintiffs' counsel has publicly declared that this is just the beginning of a series of lawsuits in various jurisdictions across the country. *Id.*

Similarly, the *amici* who make heavy equipment are concerned that, under the reasoning of *Romo* and *Smith*, they may face the same predicament as Crown Equipment Corporation, which was recently assessed with $1.25 million in punitive damages for alleged defects in a stand-up lift truck. *McEuin v. Crown Equip. Corp.*, No. CV-97-00365 (D. Or.), *appeal docketed*, No. 00-36043 (CA9 2001). The evidence at trial showed that the design met universally followed industry practices and complied with standards

promulgated by the U.S. military, the American National Standards Institute, and the Occupational Safety and Health Administration. Despite all of this evidence, the trial court denied Crown Equipment's posttrial motions. The case currently is pending before the U.S. Court of Appeals for the Ninth Circuit.

Finally, many businesses face similar problems in the context of current asbestos litigation, where companies that did not manufacture asbestos, but merely used asbestos-containing materials in their factories decades ago, are vulnerable to enormous punitive damages. *See, e.g., U.S. Steel Loses Asbestos Lawsuit*, L.A. Times, Mar. 31, 2003 at C1 (discussing a $200 million punitive damage award based on U.S. Steel's use of asbestos-containing insulation in one of its plants).

In sum, *amici* all are affected by the issues raised in *Romo* and *Smith* regarding the proper application of the reprehensibility guidepost in cases involving serious personal injury. *Amici* respectfully request that this Court grant certiorari to clarify that the existence of serious personal injury does not make a company's conduct highly reprehensible *per se*. To determine whether the defendant's conduct was highly reprehensible, courts must consider a variety of factors, including whether the risk of injury was unreasonable, whether the defendant understood the risk before engaging in the conduct, whether the defendant consciously disregarded or actively concealed the risk for the purpose of causing harm, whether the defendant complied with applicable regulations and industry standards, and whether juries or regulatory bodies had previously determined that the defendant's conduct was not punishable.

II.

CONFUSION ABOUT THE PROPER INTERPRETATION OF *BMW*'S "CIVIL AND CRIMINAL PENALTIES" GUIDEPOST HAS BECOME EPIDEMIC.

As the petitions explain, the lower courts in *Romo* and *Smith* practically ignored the third *BMW* guidepost: comparison of the amount of punitive damages with civil and criminal penalties for comparable misconduct. This is not unusual. State and federal courts are badly split on the proper application of the third *BMW* guidepost, with many courts simply choosing to ignore it altogether.

This Court explained in *BMW* that, when applying the third guidepost, appellate courts "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." 517 U.S. at 583 (internal quotations omitted). This concept, which was not part of the traditional post-verdict review of punitive damages prior to *BMW*, was one of the most significant aspects of the *BMW* opinion. *See* Paul M. Sykes, Note, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in* BMW v. Gore, 75 N.C. L. Rev. 1084, 1112 (1997) (stating that the third guidepost, unlike the others, "adds a new tool to the toolchests of lower courts"). *But see Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 671-72 (N.M. 2002) (criticizing this Court's adoption of the third guidepost and describing it as the "least important indicium" of excessiveness).

Unfortunately, since *BMW*, most appellate courts have not accorded *any* deference, much less substantial deference, to legislative judgments concerning the appropriate

sanctions for misconduct. This trend continues even after this Court's decision two years ago in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), which adopted a *de novo* standard of review for application of the *BMW* guideposts and specifically observed that the third *BMW* guidepost, compared to the first two, "seems more suited to the expertise of appellate courts." *Id.* at 440.

Appendix B to this brief lists the federal and state appellate cases that have considered the constitutionality under *BMW* of a punitive damage award of $1 million or more.[2] Nearly forty percent of these cases (39 out of 101) did not even state whether legislatively established penalties existed for comparable misconduct, let alone accord these penalties substantial deference. Many of these cases upheld seven-figure punitive awards against constitutional attack under *BMW* without even *mentioning* the third guidepost.[3]

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[2] The problem discussed in this section is not limited to the cases with the largest punitive awards. Many appellate courts have affirmed awards under $1 million without discussing statutory penalties. *See, e.g., Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 146 F.3d 983, 993-94 (CADC 1998) (upholding $100,000 award); *Routh Wrecker Serv., Inc. v. Washington*, 980 S.W.2d 240, 244-45 (Ark. 1998) (upholding $75,000 award); *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256, 259, 261 (Ga. Ct. App. 1996) (upholding $65,000 award); *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 594-95 (Iowa 1999) (upholding $30,000 award); *Garcia v. Coffman*, 946 P.2d 216, 224-25 (N.M. Ct. App. 1997) (upholding $50,000 award); *Bardonaro v. Gen. Motors Corp.*, 2000 Ohio App. LEXIS 3479, at *16-*18 (Ct. App. Aug. 4, 2000) (unreported) (upholding $100,000 award).

[3] *See, e.g., Clark v. Chrysler Corp.*, 310 F.3d 461, 481-82 (CA6 2002); *Cable & Computer Tech. Inc. v. Lockheed Sanders Inc.*, 52 Fed. Appx. 20, 23 (CA9 2002); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235,

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Nearly twenty percent (20 out of 101) of the cases in Appendix B acknowledged that statutory penalties existed, but chose to ignore them. Some courts decided to ignore statutory penalties that they perceived to be too low.[4] Other courts ignored statutory penalties because no government agency ever sought to impose them against the defendant. *See Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1219 (Ala. 1999); *Anchor Hocking*, 27 P.3d at 1099; *see also Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 507 (S.D. 1997). In *Romo*, the court actually concluded that the absence of any prior punishment made a $290 million punitive damage award *more* acceptable. *Romo,* Pet. App. 36a; *see also Anchor Hocking*, 27 P.3d at 1099. Such decisions perversely use legislative judgments that particular conduct does not deserve a heavy penalty as a reason to disregard that judgment and as a license to impose heavy punitive damages.

1252-54 (CA10 2000); *Arrow Int'l, Inc. v. Sparks*, 2003 Ark. App. LEXIS 107, at *19-*20 (Feb. 12, 2003) (unreported); *Notrica v. State Comp. Ins. Fund*, 83 Cal. Rptr. 2d 89, 114, 116-18 (Ct. App. 1999); *Owens-Corning Fiberglas Corp. v. Rivera*, 683 So. 2d 154, 155, 156 (Fla. Dist. Ct. App. 1996); *Bibb Distrib. Co. v. Stewart*, 519 S.E.2d 455, 459 (Ga. Ct. App. 1999); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 147-48 (Iowa 1996); *Cooper Tire & Rubber Co. v. Tuckier*, 826 So. 2d 679, 690-91 (Miss. 2002); *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So. 2d 637, 646-47 (Miss. 1998); *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 589 (Mo. Ct. App. 2001); *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1053 & n.16 (Nev. 2000); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 476 (Or. 1999).

[4] *See, e.g., Union Sec. Life Ins. Co. v. Crocker*, 709 So. 2d 1118, 1122 (Ala. 1997); *Ford Motor Co. v. Sperau*, 708 So. 2d 111, 122 (Ala. 1997); *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 531 (Ala. 1997); *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997); *see also Aken*, 49 P.3d at 672 (deeming low penalties "not helpful" when other guideposts weighed in favor of affirmance).

Some courts, like the Kentucky Supreme Court in *Smith*, 83 S.W.3d at 495-96, ignored comparable statutory penalties and looked only at jury awards in similar cases.[5] Since enormous punitive damage awards were precisely the problem this Court was seeking to rectify when it delineated its three guideposts, reliance on those awards to justify other awards is circular and illogical, effectively rendering the third guidepost meaningless.

Other courts have declared the third guidepost inapplicable when the comparable penalties included imprisonment. *See Romo*, Pet. App. 39a; *Williams v. Philip Morris Inc.*, 48 P.3d 824, 842 (Or. Ct. App. 2002) (observing in connection with plaintiff's argument that defendant's conduct was punishable by imprisonment: "[w]e do not believe that [the third guidepost] plays a major role one way or the other"). Since many torts also constitute crimes punishable by imprisonment, this analysis, too, tends to render the third guidepost meaningless.

Where there are no statutory penalties for comparable misconduct, some appellate courts have simply declared the third guidepost inapplicable.[6] A few courts have

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[5] *See, e.g., O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100, 115 (Ill. App. Ct. 2002) ("Finally, the jury's award is in line with punishment meted out in comparable cases."); *Gregory v. Shelby County, Tennessee*, 220 F.3d 433, 445 (CA6 2000) ("Finally, the third factor provides little guidance in this determination as the parties have provided no evidence of similar jury verdicts on this issue."); *Harris v. Soley*, 756 A.2d 499, 509 (Me. 2000) (acknowledging third guidepost but discussing only cases, not statutory penalties); *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 177-79 (Mo. Ct. App. 1997) (same).

[6] *See, e.g., Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 562-63 (Ind. Ct. App. 1999) ("In this case however there is no comparable civil statutory penalty. . . . The same is true for criminal penalties. Thus this

(Continued on following page)

reached the opposite conclusion, and treated the third guidepost as an indicium of excessiveness when the legislature has not prescribed any penalties for the conduct at issue. *See, e.g.*, *FDIC v. Hamilton*, 122 F.3d 854, 862 (CA10 1997); *Langmead v. Admiral Cruises, Inc.*, 696 So. 2d 1189, 1194 (Fla. Dist. Ct. App. 1997).

In sum, the lower appellate courts are hopelessly conflicted about the proper interpretation of the third guidepost. The vast majority have simply ignored it or given it short shrift. Those that have considered the third guidepost cannot agree on how it should be applied when statutory penalties are small or non-existent.

Amici respectfully request that this Court grant certiorari to resolve this confusion. Specifically, *amici* ask this Court to explain that the third *BMW* guidepost is essential, not optional, and that when legislatively established penalties for comparable misconduct are small or nonexistent, this guidepost weighs against the imposition of a large punitive damage award.

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portion of the *Gore* indicia of excessiveness is not applicable.") (footnote omitted); *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437, 445 (Miss. 1999) (disposing of third guidepost by stating "there are no other sanctions which would be imposed under the facts of this case"); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 641 N.W.2d 504, 517 (Wis. Ct. App. 2002) ("[W]hen a legislature has not prescribed penalties for the type of conduct engaged in by the defendant, this third guidepost becomes immaterial."), *rev. granted*, 653 N.W.2d 888 (Wis. 2002); *see also Aken*, 49 P.3d at 672 (noting that this Court has been criticized by commentators for failing to " 'give any guidance as to what to do if there are *not* any' " statutory penalties for comparable misconduct).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Allergan, Inc.

Allergan, Inc., headquartered in Irvine, California, is a global health care company that develops and commercializes specialty pharmaceutical products for the opthalmic, neurological, dermatological and other specialty markets. The company is a pioneer in specialty pharmaceutical research, targeting products and technologies related to specific disease areas such as glaucoma, retinal disease, dry eye, psoriasis, acne, photodamage, movement disorders, metabolic disease and various types of cancer. Botox® (also known as Botox® Cosmetic) is currently the company's largest product in terms of sales volume and is widely accepted as the standard therapy for treating neuromuscular disorders and facial lines. Botox® Cosmetic was approved in April 2002 by the U.S. Food and Drug Administration ("FDA") for the temporary treatment of moderate to severe brow furrow lines in adults age sixty-five or younger.

Allergan's pharmaceutical products and biologics are subject to extensive pre- and post-market regulation by state agencies and the FDA, including regulations that govern the testing, manufacturing, safety, efficacy, labeling, storage, record keeping, advertising and promotion of products under the Federal Food, Drug and Cosmetic Act and the Public Health Services Act. Approval by the FDA of a New Drug Application is required prior to marketing a new drug, and approval of a Biologics License Application is required before a biologic may be legally marketed in the United States. The FDA may withdraw approval if compliance with the pre- and post-market regulatory standards is not maintained or if problems occur after the

product reaches the marketplace. The FDA has broad post-market regulatory and enforcement powers, including the authority to levy fines and civil penalties, suspend or delay issuance of approvals, seize or recall products, or withdraw approvals.

The Anchor Hocking Company

Founded in Lancaster, Ohio at the turn of the last century, The Anchor Hocking Company is now a leading producer of consumer glass products, including a wide range of glass tableware and containers.

BASF Corporation

BASF Corporation, the U.S. subsidiary of BASF AG, one of the world's largest chemical companies, produces a wide range of high-performance products, including high-value chemicals, plastics, colorants, pigments, automotive and industrial coatings and agricultural products, which it provides to a wide variety of industries, including the detergent, printing, coating, leather, automotive, oil, and textile industries. BASF Corp. must comply with a broad range of regulatory controls on the testing, manufacture, and marketing of many of its products. In particular, chemical companies have become subject to increasingly stringent legislation and regulations related to occupational health and safety, product registration, and environmental protection.

Bell Sports Corporation

Bell Sports Corporation is the leading manufacturer and marketer of bicycle helmets worldwide and a leading

supplier of a broad line of bicycle accessories in North America. Bell Sports is also a supplier of in-line skating, snowboarding, snow skiing, and water sport helmets. Over its history, Bell Sports has developed a reputation for innovation, design, quality, and safety. Since its founding, Bell Sports has engaged in the manufacture and sale of bicycle helmets, bicycle accessories, auto racing helmets, and motorcycle helmets, but in recent years has elected to refocus its operations on the growing bicycle helmet and accessory business. Bell Sports is subject to many federal, state, and local requirements relating to the protection of the environment.

BIC Corporation

BIC Corporation, headquartered in Milord, Connecticut, is a world leader in stationery products, lighters, and shavers. Its products are distributed in a variety of retail locations from local food and tobacco shops, stationery stores, supermarkets, office retail outlets, superstores, mass merchandisers, and warehouse clubs. Every day the world over, consumers buy: twenty-one million BIC stationery products, four million BIC lighters, and ten million BIC shavers. BIC products are present in five contintents and in more than 160 countries. BIC is the market leader in disposable lighter design, manufacture, and sales and is the only U.S. manufacturer of disposable lighters.

BIC has historically been involved in product liability litigation where claimants have asserted that its lighters are defective. BIC complies with varied government regulations and industry standards.

Bombardier, Inc.

Bombardier, Inc. is a diversified corporation composed of autonomous operating groups that manufacture regional, business and amphibious aircraft, rail transportation systems, and recreational vehicles.

Caterpillar

Caterpillar manufactures a wide range of earthmoving, mining and construction equipment used to build roads, dams, homes, bridges, and other infrastructure. Caterpillar is also the world's largest manufacturer of medium speed engines and high speed diesel engines.

CSX Transportation, Inc.

CSX Transportation, Inc. is the largest rail network in the eastern United States, providing rail freight transportation over a network of more than 23,000 miles in twenty-three states, the District of Columbia, and two Canadian provinces. CSX Transportation is a wholly owned subsidiary of CSX Corporation, which owns other transportation businesses, including an intermodal and trucking company, a container-freight terminal company, and a domestic container-shipping company. CSX Transportation's activities are comprehensively regulated pursuant to the Federal Railroad Safety Act.

The Dow Chemical Company

The Dow Chemical Company ("Dow") is a leading science and technology company that provides innovative chemical, plastic, and agricultural products and services to a wide range of markets that are vital to human progress,

including food, transportation, health and medicine, personal and home care, and building and construction. Dow, like other chemical companies, is subject to increasingly stringent legislation and regulations related to occupational health and safety and environmental protection.

Eaton Corporation

Eaton Corporation, headquartered in Cleveland, Ohio, is a global, diversified, industrial manufacturer of fluid power, electrical distribution, automotive power train and truck drive train systems used to run aerospace systems, off-highway agricultural and construction vehicles, industrial equipment, and passenger cars and trucks.

Eli Lilly and Company

Eli Lilly and Company ("Lilly") is a leader in developing pharmaceutical products, in recent years introducing important new drugs for the treatment of cancer, schizophrenia, osteoporosis, diabetes, cardiovascular complications, and severe sepsis. Lilly introduced the first commercially available insulin product for the treatment of diabetes in 1923 and revolutionized the treatment of depression with the introduction of Prozac® in the late 1980s. The introduction and marketing of Lilly's pharmaceutical products are broadly regulated by the FDA.

ExxonMobil Corporation

ExxonMobil Corporation's principal business is energy, including the exploration for and production of

crude oil and natural gas, the manufacture and transportation of petroleum products, and the sale of crude oil, natural gas, and petroleum products. ExxonMobil's activities are governed by numerous environmental laws and regulations.

Great Dane Limited Partnership

Great Dane Limited Partnership is the largest manufacturer, in terms of total revenues, of truck trailers and intermodal containers and chassis in the United States. Great Dane's principal products include dry freight vans, refrigerated vans, platform trailers, and specialized intermodal containers and chassis used to transport raw materials, industrial supplies, agricultural produce, refrigerated foods, finished goods, electronic equipment, machinery, and steel to warehouses, manufacturing plants, and retail stores. Great Dane's products are subject to regulation by the National Highway Traffic Safety Administration.

Heil Company

Heil Company is a leading manufacturer of front, rear, and side loading trucks used to collect and recycle waste from business and industry, as well as from residential customers.

Johnson & Johnson

Johnson & Johnson is the world's most comprehensive and broadly-based manufacturer of health care products for the consumer, pharmaceutical, and professional markets. Johnson & Johnson's worldwide business is divided into

three segments: Consumer, Pharmaceutical, and Medical Devices and Diagnostics. The Consumer segment's principal products are personal care products, including nonprescription drugs, adult skin and hair care products, baby care products, oral care products, first aid products, women's health products, and nutritional products. Pharmaceutical segment products include antifungal, anti-infective, cardiovascular, contraceptive, dermatology, gastrointestinal, hematology, immunology, neurology, oncology, pain management, psychotropic (central nervous system), and urology treatments. The Medical Devices and Diagnostics segment includes wound care and surgical sports medicine products, as well as disposable contact lenses. Most of Johnson & Johnson's business is subject to the broad regulatory powers of the FDA, which requires increased amounts of testing and documentation prior to the approval and introduction of new drugs and devices.

Monsanto Company

Monsanto Company is a leading global provider of agricultural products and integrated solutions to improve farm productivity and food quality. Monsanto products range from Roundup herbicide to high quality brand name seeds for important food crops such as wheat, soybean, corn, and grain.

Novartis Pharmaceuticals Corporation

Novartis Pharmaceuticals Corporation researches, develops, manufactures, and markets leading innovative prescription drugs used to treat a number of diseases and conditions, including central nervous system disorders, organ transplantation, cardiovascular diseases, dermatological

diseases, respiratory disorders, cancer, and arthritis. The company's mission is to improve people's lives by pioneering novel healthcare solutions. Prescription drugs are subject to broad regulation by the FDA.

Located in East Hanover, New Jersey, Novartis Pharmaceuticals Corporation is an affiliate of Novartis AG, a world leader in healthcare with core businesses in pharmaceuticals, consumer health, generics, eye-care, and animal health.

Unocal Corporation

Unocal Corporation, the parent company of the Union Oil Company of California, is one of the world's leading independent oil and gas exploration, development, and production companies. Unocal's activities are subject to extensive federal, state, and local laws.

Whirlpool Corporation

Whirlpool Corporation is the world's leading manufacturer and marketer of major home appliances. The company's principal products are home laundry appliances, home refrigerators and freezers, home cooking appliances, home dishwashers, room air-conditioning equipment, mixers, and other small household appliances. Whirlpool has been the principal supplier of home laundry appliances to Sears Roebuck and Company under the Kenmore brand name for over eighty years. Whirlpool's manufacturing facilities are subject to numerous environmental laws and regulations. Whirlpool's products, like those of other appliance manufacturers, are subject to regulation by the Consumer Product Safety Commission.

Wilbur-Ellis Company

Incorporated in 1921, Wilbur-Ellis Company is an international marketer and distributor of agricultural and industrial products. A distributor for major chemical companies, Wilbur-Ellis sells animal feed, fertilizer, insecticides, seeds, and machinery throughout North America.

APPENDIX B

Appellate Cases Considering the Constitutionality Under *BMW* of a Punitive Award of $1 Million or More

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
3d Circuit *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446 (CA3 1999)			
$100.6 million	Unfair competition	$500,000 or $1.5 million; disregarded as unhelpful	$1 million
6th Circuit *Clark v. Chrysler Corp.*, 310 F.3d 461 (CA6 2002)			
$3 million	Products liability	Not discussed	$3 million
McHugh v. Olympia Entm't, Inc. 37 Fed. Appx. 730 (CA6 2002)			
$1.2 million	Assault, civil rights violation (minor injuries)	Not discussed	$1.2 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Gregory v. Shelby County, Tennessee, 220 F.3d 433 (CA6 2000)			
$2.2 million	Violation of prisoner's civil rights (death)	Not discussed	$2.2 million
8th Circuit *Morse v. S. Union Co.*, 174 F.3d 917 (CA8 1999)			
$6.25 million	Employment discrimination	Not discussed	$400,000
Watkins v. Lundell, 169 F.3d 540 (CA8 1999)			
$3.5 million	Fraudulent inducement of contract	$10,000	$940,000
Denesha v. Farmers Ins. Exch., 161 F.3d 491 (CA8 1998)			
$4 million	Employment discrimination	Not discussed	$700,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
EEOC v. HBE Corp., 135 F.3d 543 (CA8 1998)			
$4.8 million	Employment discrimination	Not discussed	$480,000
Kim v. Nash Finch Co., 123 F.3d 1046 (CA8 1997)			
$7 million	Employment discrimination	$300,000	$300,000
Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (CA8 1997)			
$50 million	Sexual harassment	$300,000 (federal statute); disregarded as inapplicable to state law claim	$350,000
9th Circuit *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146 (CA9 2002) (on remand)			
$4.5 million	Trade dress infringement	Existence of statutory penalties discussed, but amount not mentioned	$500,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Cable & Computer Tech. Inc. v. Lockheed Sanders Inc., 52 Fed. Appx. 20 (CA9 2002)			
Two awards of $25.7 million	Fraud	Not discussed	Two awards of $12.8 million
In re Exxon Valdez, 270 F.3d 1215 (CA9 2001)			
$5 billion	Oil spill (injury to fishing interests)	$200,000 or double the amount of harm caused	Vacated & remanded
Swinton v. Potomac Corp., 270 F.3d 794 (CA9 2001)			
$1 million	Racial harassment	$300,000	$1 million
Demendoza v. Huffman, 1 Fed. Appx. 665 (CA9 2001)			
$1.1 million	Abuse of process, fraud	Not discussed	$550,000
Ace v. Aetna Life Ins. Co., 139 F.3d 1241 (CA9 1998)			
$16.5 million	Insurance bad faith	$500,000	Vacated & remanded

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
VisionQuest Nat'l, Ltd. v. Marimed Found., 1998 U.S.App. LEXIS 15340 (CA9 July 6, 1998) (unreported)			
$1.75 million	Tortious breach of contract	Not discussed	$1.75 million
Guzman v. Tower Dev., Inc., 1997 U.S. App. LEXIS 36006 (CA9 Dec. 19, 1997) (unreported)			
$4 million	Fraud, conversion	None; guidepost disregarded because no penalties found	$4 million
10th Circuit *Hampton v. Dillard Dep't Stores*, 247 F.3d 1091 (CA10 2001)			
$1.1 million	Interference with contract	None; guidepost disregarded because no penalties found	$1.1 million
Bielicki v. Terminix Int'l Co., 225 F.3d 1159 (CA10 2000)			
$2.04 million	Negligence	$30,000 and one year in prison (federal); $1,000 and revocation of license (state)	$2.04 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (CA10 2000)			
$17.46 million	Products liability (amputation)	Not discussed	$17.46 million
United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207 (CA10 2000), *aff'd*, 532 U.S. 588 (2001)			
$58.5 million	Securities fraud	$2,500,000 (federal) and $750,000 (state)	$58.5 million
Deters v. Equifax Credit Info. Servs., Inc., 202 F.3d 1262 (CA10 2000)			
$1 million	Sexual harassment	$300,000	$295,000
FDIC v. Hamilton, 122 F.3d 854 (CA10 1997)			
$1.2 million	Fraud	None; treated as mitigating factor	$264,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Klein v. Grynberg, 1997 U.S. App. LEXIS 28858 (CA10 Oct. 20, 1997) (unreported)			
$3 million	Breach of fiduciary duty	Not discussed	$600,000
Cont'l Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634 (CA10 1996)			
$30 million	Interference with contract	"[V]ery large"	$6 million
11th Circuit *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (CA11 1999)			
$45 million	Pollution	$10,000	$4.35 million
Federal Circuit *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335 (CAFed 2001), *petition for cert. filed sub nom. DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, No. 02-130 (U.S. July 24, 2002)			
$50 million	Fraud	Incarceration and fine at discretion of the court	$50 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Alabama			
Acceptance Ins. Co. v. Brown, 832 So. 2d 1 (Ala. 2001)			
$1.2 million	Insurance bad faith	Not discussed	$180,000
Orkin Exterminating Co. v. Jeter, 832 So. 2d 25 (Ala. 2001)			
$80 million	Fraud	$900,000	$2 million
Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d 166 (Ala. 2000)			
$3 million	Malicious prosecution	Not discussed	$600,000
Prudential Ballard Realty Co., Inc. v. Weatherly, 792 So. 2d 1045 (Ala. 2000)			
$2.5 million	Real estate fraud	Not discussed	$750,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Lance, Inc. v. Ramanauskas, 731 So. 2d 1204 (Ala. 1999)			
$13 million	Wrongful death	Disregarded because fines not sought or imposed	$4 million
McKowan v. Bentley, 773 So. 2d 990 (Ala. 1999)			
$2 million	Wrongful death	None; guidepost disregarded because no penalties found	$2 million
Union Sec. Life Ins. Co. v. Crocker, 709 So. 2d 1118 (Ala. 1997)			
$2 million	Fraud	$2,000; disregarded because too low	$1 million
Ford Motor Co. v. Sperau, 708 So. 2d 111 (Ala. 1997)			
$6 million	Fraud	$2,000; disregarded because too low	$1.79 million
Cherokee Elec. Coop. v. Cochran, 706 So. 2d 1188 (Ala. 1997)			
$3 million	Wrongful death	None; guidepost disregarded because no penalties found	$3 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Am. Pioneer Life Ins. Co. v. Williamson, 704 So. 2d 1361 (Ala. 1997)			
$2 million	Fraud	Not discussed	$750,000
Talent Tree Pers. Servs., Inc. v. Fleenor, 703 So. 2d 917 (Ala. 1997)			
$3 million	Fraud	2 to 20 years in prison	$1.5 million
Life Ins. Co. of Ga. v. Johnson, 725 So. 2d 934 (Ala. 1998)			
$15 million	Fraud	$1,000; disregarded because too low	$3 million
BMW of N. Am., Inc. v. Gore, 701 So. 2d 507 (Ala. 1997)			
$4 million	Fraud	$2,000; disregarded because too low	$50,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997)			
$4.5 million $3 million $4.5 million $3 million	Fraud	$1,000	$114,500 $60,500 $112,500 $60,500
Arkansas *Arrow Int'l, Inc. v. Sparks*, 2003 Ark. App. LEXIS 107 (Feb. 12, 2003) (unreported)			
$4 million	Wrongful death	Not discussed	$4 million
Edwards v. Stills, 984 S.W.2d 366 (Ark. 1998)			
$1.5 million	Assault, battery, false imprisonment, outrage	Imprisonment for life	$1.5 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
California			
Romo v. Ford Motor Co., 122 Cal. Rptr. 2d 139 (Ct. App. 2002), *petition for cert. filed*, No. 02-1097 (U.S. Jan 21, 2003)			
$290 million	Products liability (death)	$10,000 or imprisonment; disregarded as inapplicable to corporation	$290 million
Henley v. Philip Morris, Inc., 2003 Cal. App. Unpub. LEXIS 2699 (Mar. 19, 2002) (unreported)			
$50 million	Products liability, fraud	$6,000 fine per offense; possible total of $6.6 million	$25 million
Earnest v. Truck Ins. Exch., 2002 Cal. App. Unpub. LEXIS 10976 (Nov. 26, 2002) (unreported)			
$30 million	Insurance bad faith	Not discussed	$3 million
Tosco Corp. v. N.H. Ins. Co., 2002 Cal. App. Unpub. LEXIS 10077 (Oct. 30, 2002) (unreported)			
$18.2 million	Insurance bad faith	$10,000 or $55,000 or suspension of license	$4.6 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2002 Cal. App. Unpub. LEXIS 6131 (June 28, 2002) (unreported), *petition for cert. filed*, 02-966 (U.S. Dec. 20, 2002)			
$10 million	Insurance bad faith	$10,000 or $55,000	$1.7 million
Friedman v. Royal Maccabees Life Ins. Co., 2002 Cal. App. Unpub. LEXIS 1701 (May 28, 2002) (unreported)			
$7 million	Insurance bad faith	$10,000 or $55,000 or imprisonment	$7 million
State Comp. Ins. Fund. v. WPS, Inc., 2001 Cal. App. Unpub. LEXIS 2485 (Oct. 22, 2001) (unreported)			
$3 million	Fraud	Not discussed	$3 million
Simon v. San Paolo U.S. Holding Co., 2001 Cal. App. Unpub. LEXIS 1860 (Nov. 7, 2001) (unreported)			
$1.7 million	Fraud	$2,500 or imprisonment	$1.7 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Notrica v. State Comp. Ins. Fund, 83 Cal. Rptr. 2d 89 (Ct. App. 1999)			
$20 million	Insurance bad faith	Not discussed	$5 million
Florida *Langmead v. Admiral Cruises, Inc.*, 696 So. 2d 1189 (Fla. Dist. Ct. App. 1997)			
$3.5 million	Personal injury (minor injury to eye)	None; treated as mitigating factor	None
Owens-Corning Fiberglas Corp. v. Rivera, 683 So. 2d 154 (Fla. Dist. Ct. App. 1996)			
$1.5 million	Products liability (asbestosis)	Not discussed	$1.5 million
Georgia *Time Warner Entm't Co. v. Six Flags Over Ga.*, 563 S.E.2d 178 (Ga. Ct. App. 2002), *petition for cert. filed*, No. 02-978 (U.S. Dec.23, 2002)			
$257 million	Breach of fiduciary duty	Double or treble the amount of harm caused	$257 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Bibb Distrib. Co. v. Stewart, 519 S.E.2d 455 (Ga. Ct. App. 1999)			
$12.5 million	Forgery, theft, conversion	Not discussed	$12.5 million
Idaho *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996)			
$10 million	Fraud, insurance bad faith	Not discussed	$3.2 million
Illinois *O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100 (Ill. App. Ct. 2002)			
$2.3 million	Insurance bad faith	Not discussed	$2.3 million
Indiana *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999)			
Two awards of $29 million	Products liability	None; guidepost disregarded because no penalties found	Two awards of $6.9 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Mich. Mut. Ins. Co. v. Sports, Inc., 698 N.E.2d 834 (Ind. Ct. App. 1998)			
$1 million	Insurance bad faith	$200,000	$1 million
Iowa *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996)			
$15 million	Defamation, breach of fiduciary duty	Not discussed	$2 million
Kentucky *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *petition for cert. filed sub nom. Ford Motor Co. v. Estate of Tommy Smith*, No. 02-1096 (U.S. Jan. 21, 2002)			
$20 million	Products liability (death)	Not discussed	$15 million
Ky. Farm Bureau Mut. Ins. Co. v. Rodgers, 2002 Ky. App. LEXIS 1922 (Sept. 13, 2002) (unreported)			
$1 million	Insurance bad faith	Suspension or revocation of license	$1 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Louisiana *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364 (La. Ct. App. 2001)			
$2.5 billion	Mishandling of toxic substance	$1 million fine	$850 million
Maine *Harris v. Soley*, 756 A.2d 499 (Me. 2000)			
$1 million	Int. infliction of emot. distress, conversion	Not discussed	$1 million
Maryland *Bowden v. Caldor, Inc.*, 710 A.2d 267 (Md. 1998)			
$9 million	Malicious prosecution, defamation, false imprisonment	$1 million (maximum fine authorized by any Md. law)	Remittitur reversed & remanded

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Michigan			
Abramczyk v. Southgate, 2002 Mich. App. LEXIS 530 (Apr. 9, 2002) (unreported)			
$19.25 million	Retaliation against whistleblower	Existence of statutory penalties discussed, but amount not mentioned	$1.75 million
Mississippi			
Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679 (Miss. 2002)			
$3 million	Products liability (death)	Not discussed	$3 million
MIC Life Ins. Co. v. Hicks, 825 So. 2d 616 (Miss. 2002)			
$6 million	Breach of fiduciary duty	$5,000	Reversed & remanded
Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437 (Miss. 1999)			
$1.5 million $1.5 million	Wrongful termination	None; guidepost disregarded because no penalties found	$1.5 million $1.5 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So. 2d 637 (Miss. 1998)			
$1.25 million	Insurance bad faith	Not discussed	$1.25 million
Missouri *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575 (Mo. Ct. App. 2001)			
$1 million	Sexual battery	Not discussed	$1 million
Letz v. Turbomeca Engine Corp., 975 S.W.2d 155 (Mo. Ct. App. 1997)			
$67.5 million	Wrongful death	Not discussed	$26.5 million
Barnett v. La Societe Anonyme Turbomeca Fr., 963 S.W.2d 639 (Mo. Ct. App. 1997)			
$175 million	Wrongful death	Not discussed	$26.5 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Nevada *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043 (Nev. 2000)			
$6 million	Conversion	Not discussed	$6 million
New Mexico *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662 (N.M. 2002)			
$1.75 million $1 million	Wrongful termination, defamation	$70,000 or $300,000 fines disregarded as not helpful; possibility of incarceration cited as basis for affirming	$1.75 million $300,000
Allsup's Convenience Stores, Inc. v. N. River Ins. Co., 976 P.2d 1 (N.M. 1998)			
$4 million $500,000	Insurance bad faith	Revocation of license	$4 million $500,000
Ohio *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002)			
$49 million	Insurance bad faith	$3,500 and loss of business license	$30 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Wightman v. Consol. Rail Corp., 715 N.E.2d 546 (Ohio 1999)			
$25 million	Wrongful death	Prosecution for manslaughter	$15 million
Williams v. Aetna Fin. Co., 700 N.E.2d 859 (Ohio 1998)			
$1.5 million	Fraud	Not discussed	$1.5 million
Oregon *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001)			
$1 million	Unlawful trade practices	Loss of business license and fine up to $25,000	$1 million
Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999)			
$4 million	Products liability (brain damage and paralysis)	Not discussed	$4 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Williams v. Philip Morris Inc., 48 P.3d 824 (Or. Ct. App. 2002)			
$79.5 million	Fraud	Imprisonment; disregarded as inapplicable to corporation	$79.5 million
Bocci v. Key Pharm., Inc., 35 P.3d 1106 (Or. Ct. App. 2001), *petition for cert. filed*, No. 02-342 (U.S. Aug. 30, 2002)			
$35 million $22 million	Products liability (brain damage)	Not discussed	$35 million $22 million
Waddill v. Anchor Hocking, Inc., 27 P.3d 1092 (Or. Ct. App. 2001), *petition for cert. filed*, No. 02-370 (U.S. Sept. 3, 2002)			
$1 million	Products liability (cuts on arms and wrists)	Disregarded because fines not sought or imposed	$1 million
Jensen v. Medley, 11 P.3d 678 (Or. Ct. App. 2000), *review granted*, 52 P.3d 436 (Or. 2002)			
$1.25 million	Retaliation against whistleblower	$1,000 and one year in prison	$175,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
MacCrone v. Edwards Ctr., Inc., 980 P.2d 1156 (Or. Ct. App. 1999) (en banc)			
$1.25 million	Intentional infliction of emotional distress	$7,000 and 18 months in prison	$1.25 million
Axen v. Am. Home Prods. Corp., 974 P.2d 224 (Or. Ct. App. 1999)			
$20 million	Products liability (blindness)	$60,000 and injunction against future sales	$20 million
Pennsylvania *Pioneer Commercial Funding Corp. v. Am. Fin. Mortgage Corp.*, 797 A.2d 269 (Pa. Super. Ct. 2002)			
$337.5 million	Conversion	Not discussed	Vacated & remanded
South Carolina *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 2003 S.C. App. LEXIS 17 (Feb. 3, 2003) (unreported)			
$1.57 million	Interference with contract	Not discussed	$1.57 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Welch v. Epstein, 536 S.E.2d 408 (S.C. Ct. App. 2000)			
$3.9 million	Medical malpractice (death)	Not discussed	$3.9 million
Hundley v. Rite Aid of S. C., Inc., 529 S.E.2d 45 (S.C. Ct. App. 2000)			
$10 million $1 million	Pharmacist malpractice (brain damage)	$500 or 18 month imprisonment plus revocation of license	$10 million $1 million
South Dakota *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493 (S.D. 1997)			
$4.8 million	Fraud	$10,000 and 10 years in prison; disregarded because no charges sought	$1 million
Texas *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1998)			
$4.35 million	Products liability (asbestosis)	None; guidepost disregarded because no penalties found	$3.7 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
N. Am. Refractory Co. v. Easter, 988 S.W.2d 904 (Tex. App. 1999)			
$1.5 million	Products liability (asbestosis)	None; guidepost disregarded because no penalties found	$1.3 million
Harrison v. Querner, 1999 Tex. App. LEXIS 8914 (Nov. 30 1999) (unreported)			
$1 million	Fraud	Not discussed	$1 million
Utah *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, *cert. granted*, 122 S. Ct. 2326 (U.S. June 3, 2002) (No. 01-1289)			
$145 million	Insurance bad faith	$10,000 or loss of business license or disgorgement and treble damages	$145 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
West Virginia *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678 (W. Va. 1997)			
$1.575 million $1.124 million	Unlawful termination, retaliation	None; guidepost disregarded because no penalties found	$1.109 million $1.124 million
Wisconsin *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 641 N.W.2d 504 (Wisc. Ct. App. 2002), *rev. granted*, 653 N.W.2d 888 (Wis. 2002)			
$3.5 million	Insurance bad faith	None; guidepost disregarded because no penalties found	$3.5 million

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(5)

No. 02-1097

In the Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE CALIFORNIA CHAMBER OF COMMERCE, FLORIDA CHAMBER OF COMMERCE, INC., THE NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, GENERAL AVIATION MANUFACTURERS ASSOCIATION, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, SPORTING GOODS MANUFACTURERS ASSOCIATION, THE AMERICAN TORT REFORM ASSOCIATION, THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND THE ILLINOIS CIVIL JUSTICE LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae are organizations that together represent business companies and associations of businesses engaged in all forms of manufacturing and other commerce throughout the United States and around the world. In this era of expansive tort litigation against corporations and even entire industries, *amici*'s members have been forced to defend against products liability lawsuits seeking millions and sometimes billions of dollars in jury-imposed punitive damages. It has been *amici*'s experience that, in such cases, the lower courts routinely have been misapplying and, indeed, effectively nullifying the three excessiveness guideposts identified by this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996). *Amici* are uniformly of the view that the lower courts need guidance from this Court as to the proper application of the *BMW* guideposts in the products liability context and have joined together in both this case and *Ford Motor Co.* v. *Estate of Tommy Smith*, No. 02-1096, to urge the Court to grant plenary review in one or both of these cases to provide that needed guidance.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the last dozen years, this Court has addressed (or will address) excessiveness challenges to punitive awards in five cases — *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996); *Cooper Indus. Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441-

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that preparation and submission of this brief was funded entirely by *amicus curiae* the Product Liability Advisory Council, Inc. ("PLAC"). PLAC is a non-profit association with 131 corporate members who seek to contribute to the improvement and reform of the law governing the liability of product manufacturers. A complete list of PLAC's members is attached hereto as Appendix A.

443 (2001); *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, No. 01-1289 (argued Dec. 11, 2002).

Significantly, none of these cases involved a products liability claim.[2] As a consequence, lower courts have found a lack of clear guidance as to the proper application of the *BMW* guideposts in the products liability context. Left to their own devices, they have often misapplied or, like the court below, refused outright to apply the guideposts, essentially on the ground that death (or serious personal injury) is different. Ironically, there is no context in which it is ***more*** important to ensure that punitive damages are not arbitrary and do not exceed society's interest in rational deterrence than this one. Products are the lifeblood of the American economy. Multimillion dollar punitive awards rendered against manufacturers who have made good-faith design decisions and whose products meet and even exceed federal safety standards not only deprive product manufacturers of property without fair notice but have the inevitable effect of chilling innovation, encouraging excessive precautions, and increasing the price of products beyond the means of many potential purchasers.

Amici believe, therefore, that it is vitally important for the Court to grant plenary review in a products liability case to supply needed guidance as to the proper excessiveness inquiry in this context. We further submit that this case and *Ford* v. *Smith* are ideal for providing this needed guidance. Together, these two cases provide the Court with the opportunity to explain (i) the criteria that should be considered in determining when a product manufacturer's decision to employ a design later found by a jury to be defective should be treated as sufficiently reprehensible to warrant "a punitive sanction that is tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585); (ii) the role of the ratio guidepost when compensatory

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[2] The Court has used a product liability case to address the ***procedural*** requirements for administration of punitive damages. See *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994).

damages are high, the probability of escaping liability for tortious conduct is low, and the compensatory damages exceed the defendant's "gain" from choosing the design at issue over the supposedly safer one proposed by the plaintiff; (iii) the proper application of the comparative fines guidepost when the plaintiff seeks to analogize the defendant's tort to criminal conduct; and (iv) the significance of the fact that, when the conduct involves the design of a mass-produced product, other juries may either vindicate the defendant or seek to punish it for the same design decision. As we discuss below, each of these four issues recurs in products liability litigation and is well illustrated in the two Ford cases that are now before the Court.

ARGUMENT

Only seven years ago, this Court observed that a $2 million punitive damages award is "tantamount to a severe criminal penalty" and suggested that punishment of this magnitude must be reserved for "egregious" misconduct. *BMW*, 517 U.S. at 585. While many courts have taken that admonition to heart in cases that have not involved personal injury by ordering remittiturs of large punitive awards to mere fractions of themselves, we are aware of ***no*** post-*BMW* products liability case in which a reviewing court has ordered a remittitur of a punitive award to less than seven figures. In other words, in every post-*BMW* products liability case involving a sustainable finding of punitive liability, the reviewing court concluded that the defendant warranted a punishment "tantamount to a severe criminal penalty." These penalties have ranged from a $1.09 ***billion*** dollar punitive award (reduced from $4.8 billion) in a case alleging that General Motors defectively designed its gas tanks by placing them behind instead of above the rear axle to the $290 million penalty in this case to a $79.5 million penalty in an individual smoker's tobacco case to the $15 million punishment in *Ford* v. *Smith* to a $1 million penalty in the case of a fishbowl that shattered while being carried. It defies common sense, however, to suggest that every products liability case in which there is sufficient evidence to support ***some***

amount of punitive damages is one in which a penalty of ***millions*** or ***hundreds of millions*** of dollars is warranted. See *BMW*, 517 U.S. at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award."). As this case and *Ford* v. *Smith* both well illustrate, the lower courts are routinely misapplying the *BMW* guideposts to uphold seven, eight, and nine-digit punitive awards precisely ***because*** the cases involve products liability. The two cases are thus excellent vehicles for providing the lower courts with much- needed guidance as to the proper excessiveness analysis in the products liability context.

A. The Lower Courts Are Systematically Misapplying The First Guidepost By Treating The Marketing Of Products Entailing Risk Of Personal Injury As Reprehensible *Per Se*.

"Perhaps the most important indicium of the reasonableness of a punitive damages award" (*BMW*, 517 U.S. at 575), the degree of reprehensibility of the defendant's conduct is also the guidepost most susceptible to misapplication in products liability actions. The linchpin of this guidepost is "the accepted view that some wrongs are more blameworthy than others." *Ibid.* This guidepost thus requires reviewing courts to locate the conduct on a spectrum of reprehensibility, with a "high degree of culpability" necessary for "a substantial punitive damages award" (*id.* at 580). Reviewing courts have gone astray by treating products liability as a category that uniformly resides at the high end of the reprehensibility spectrum — without any serious effort at intra-category comparison — merely because such cases tend to involve serious personal injury.

Unlike many other classes of torts, products liability claims by definition involve physical injuries or death. Looking through the virtually inescapable lens of hindsight bias at a

seriously injured plaintiff on the one hand and a large corporate defendant that balanced safety against other benefits such as product usefulness, attractiveness, and cost to consumers on the other, juries are easily provoked to a state of outrage that leads them to award astounding sums in punitive damages irrespective of the true culpability of the defendant's conduct or the need for punishment and deterrence. As Judge Easterbrook has explained in a case involving the design of the emergency stop button on an escalator:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs. * * *
>
> Come the lawsuit, however, the passenger injured by a stop presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured if buttons were harder to find and use are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.

Carroll v. *Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted); see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001) (corporations' "superior ex ante risk judgments may be outweighed by the ex post reality of the accident victim"); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 552 (2000) (mock juror study revealed that even proper corporate balancing of risks against costs leads to

inflated punitive damages awards). Such hindsight bias is compounded substantially when the plaintiff is able to show that the defendant employed cost-benefit analysis in selecting one particular design rather than another — that the defendant "traded lives for dollars." See David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 11 (1982)).[3]

As this Court has recognized, appellate review can play a vital role in filtering out such bias and helping to ensure that punitive awards comport with the requirements of due process. See *Haslip*, 499 U.S. at 21 ("appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"). But when appellate courts evaluating reprehensibility make precisely the same errors that infected the underlying jury verdicts, such review does nothing to ameliorate the constitutional violations.[4]

The present case is illustrative. Nominally applying the reprehensibility guidepost, the court below found Ford's

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[3] Ironically, the corporate cost-benefit analysis that drives juries to award massive punitive damages is the very same risk-utility test that jurors are instructed to apply in making the underlying liability determination. See *Soule* v. *General Motors Corp.*, 882 P.2d 298, 311 (Cal. 1994) (jury must evaluate allegedly defective automobile design by balancing and weighing "such competing design considerations as risk, benefit, feasibility, and cost").

[4] The problem is exacerbated when, as in this case, the appellate court bases its decision on factual findings that the jury never even made. Like petitioner, we believe that review is warranted not only to address the proper application of the *BMW* guideposts in the products liability context, but also to clarify that, when conducting the *de novo* review required by *Cooper Industries*, courts should defer only to factual findings actually made by the jury, not to every inference that could conceivably be drawn from the evidence, when there is no reason to infer that the jury actually drew such inferences.

conduct to be "grossly reprehensible," stating:

> While defendant did not intend the death to the victims, the award here cannot be compared to cases involving a business fraud resulting only in economic harm. Further, the malicious conduct involved mass production and marketing of the dangerous vehicle purely for defendant's economic betterment. Unlike *BMW*, where the defendant's conduct was not even unlawful in all states and involved only economic consequences, the conduct here placed tens of thousands of lives at risk and actually claimed three such lives in the present case.

Pet. App. 38a (internal quotation marks and citations omitted).[5]

In other words, the court below held that Ford's conduct was at the extreme high end of the reprehensibility spectrum merely because (a) Ford knowingly (*i.e.*, intentionally) mass produced and sold a product that, although useful and highly desirable to consumers, also entailed some risk of harm, and (b) an accident involving that product resulted in the deaths of three people. In so doing, the court turned on its head the first principle of products liability law — that because most products entail some risk of harm, the task of a responsible manufacturer is to strike a reasonable balance between safety and a host of other considerations, including "marketability,

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[5] Indeed, in responding to Ford's argument that there was insufficient evidence to support a finding of "malicious or despicable" conduct, the court was even more forthright, holding:

> [Ford's argument] ignores the fact that the design and production of the vehicle was the despicable conduct * * *. Such conduct could kill people. The question is not whether the conduct, if it occurred, was despicable, the question is whether there is sufficient evidence from which a rational trier of fact could find that the knowing conduct occurred.

Pet. App. 25a-26a.

appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 88-89 (1985). Thus, the same activities that are the hallmark of good corporate behavior and should generally insulate the defendant from all liability (see note 3, *supra*) — or, at most, should be a basis for compensatory damages only — were treated as an aggravating factor supporting a jaw-dropping nine-figure punitive exaction.[6]

By conflating intentional ***conduct*** — *i.e.*, cost-benefit analysis in design decisions and the marketing of products — with intentional ***harm*** — *i.e.*, "affirmative acts of misconduct" (*BMW*, 517 U.S. at 576) — the court below deprived the reprehensibility guidepost of any constraining force in the products liability context. As one commentator has explained, design defect cases inevitably involve "'conscious design choice[s]' * * * implicat[ing] a manufacturer's decisionmaking process concerning risk-utility"; "[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with 'intent' built in." Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 356 (1994).[7] The consequence of equating complex design

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[6] Cf. Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia v. Johnson *Case in the Liability Setting: Where Do We Go With Punitive Damages After* BMW v. Gore*?*, 58 ALA. LAW. 46, 49 (1997) ("Regardless of how high the manufacturer sets the design safety standard, when an accident does occur, the plaintiff's lawyer will have an expert to testify the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money. As a result, an argument for reprehensibility can be supported in virtually every case.").

[7] See also, *e.g.*, Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN. L. REV. at 566 ("undertaking [cost-benefit] analysis and making a

decisions for inherently dangerous products like automobiles with intentionally harming the injured plaintiff is that "every actor could be held strictly liable [under that standard] for punitive, in addition to compensatory, damages for any consequence to any person that was contemplated in advance of any course of action." Owen, *supra*, 49 U. CHI. L. REV. at 22; see also *id.* at 23 ("The decision to market a product in a certain condition with certain risks may have been a good one because the expected benefits were great, and the product may not have been legally defective at all, yet under this standard the manufacturer remains subject to punishment for 'disregarding' the lesser risks by proceeding to sell the product with any danger whatsoever").

When that distorted view of intentionality is imported into the reprehensibility analysis, any attempt by a manufacturer to "think about risks in a systematic manner and to undertake [cost-benefit] calculations to ensure that there is appropriate risk balancing that is sufficiently protective" (Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN. L. REV. at 550) will be seen as the egregious misconduct justifying severe punishment under *BMW*. And the resulting sky's-the-limit punitive awards will deter the socially responsible commercial behavior that products liability law was designed to foster.

Unfortunately, the court of appeal's simpleminded equation of knowledge that a product can cause death or physical injury with high reprehensibility — while sloughing off such objective indicia of low reprehensibility as compliance with federal safety standards and consistency with industry customs and

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conscious [and correct] decision to forego the improvement will subject a company to the charge that it 'deliberately intended to injure the plaintiff'"); Owen, *supra*, 49 U. CHI. L. REV. at 26 ("a manufacturer's choices involving necessary safety trade-offs and statistically inevitable risks always can be viewed in a sense as intentional wrongs to consumers hurt by such products, as safe on balance as such products may actually be") (footnote omitted).

practice — is not unique.[8] To the contrary, we are unaware of a single published post-*BMW* opinion concluding that a manufacturer's conduct was not sufficiently egregious to warrant the penalty imposed. This Court's guidance as to the proper application of the reprehensibility guidepost in the products liability context is therefore urgently needed.

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[8] See, *e.g.*, *Clark* v. *Chrysler Corp.*, 310 F.3d 461, 482 (6th Cir. 2002) ("Chrysler's conduct resulted in the loss of life, which clearly evidences a greater disregard for the rights and safety of others than failure to reveal that a car has been repainted."); *Sand Hill Energy, Inc.* v. *Ford Motor Co.*, 83 S.W.3d 483, 494 (Ky. 2002) (rejecting arguments that truck transmission conformed to industry standards, was never subjected to recall, and involved "good faith judgment call" as to reasonableness of design, and concluding that conduct was reprehensible because "by Ford's own engineers and through many consumers, some of whom were maimed or killed, Ford was forcefully informed that its transmission was dangerous"), pet. for cert. pending sub nom. *Ford Motor Co. v. Estate of Tommy Smith*, No. 02-1096; *Cooper Tire & Rubber Co.* v. *Tuckier*, 826 So. 2d 679, 690 (Miss.) (holding that, although only 1 out of 66,000 tires was defective, "[w]hen this one defective tire results in a person's death, there is sufficient evidence to establish" reprehensibility), cert. denied, 123 S. Ct. 97 (2002); *Waddill* v. *Anchor Hocking, Inc.*, 27 P.3d 1092, 1098 (Or. Ct. App. 2001) ("conscious indifference to the possibility that the fishbowl could injure someone during ordinary use and the failure to warn of that possibility * * * implies a wilful disregard of a known risk to consumer safety"), pet. for cert. pending, No. 02-370; *North Am. Refractory Co.* v. *Easter*, 988 S.W.2d 904, 919 (Tex. Ct. App. 1999) (reprehensibility guidepost satisfied even though defendant "believed that its products were safe," because its product "endangered the health and safety of at least three individuals").

B. The Lower Courts Are Systematically Misapplying The Second Guidepost By Viewing High Compensatory Damages As Automatically Justifying High Ratios And Large Punitive Awards.

In *BMW*, this Court quite properly rejected a "categorical approach" to the ratio guidepost, reminding bench and bar that it is impossible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 517 U.S. at 582-583. Unfortunately, many lower courts have construed this pronouncement to be an invitation to disregard the ratio guidepost rather than to build an analytical framework through case-by-case development. Nowhere is this problem more evident than in the products liability context. Not only do some courts employ a mathematical bright line rule that single-digit ratios are per se indicative of a constitutionally permissible punishment — no matter how large the compensatory damages may be — but others have simply cast aside the reasonable relationship requirement on the ground that the injuries were severe.[9] Because products liability actions by definition

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[9] See, *e.g.*, *Burton* v. *R.J. Reynolds Tobacco Co.*, 205 F. Supp. 2d 1253, 1263 (D. Kan. 2002) (allowing $15 million in punitive damages, or 76.4 times compensatory damages, on theory that personal injuries warrant greater ratios than economic injuries); *Sand Hill Energy*, 83 S.W.3d at 494 (affirming punitive damages of 5 times multimillion dollar compensatory award because "[t]he harm to Tommy Smith was death. The harm to his estate was the total destruction of his power to labor and earn money. It would be impossible to overstate the degree of harm."); *Williams* v. *Philip Morris Inc.*, 48 P.3d 824, 840-842 (Or. Ct. App. 2002) (affirming punitive damages award of $79.5 million, or 97 times compensatory damages, because "the jury could have found that defendant's actions resulted in Williams' death; based on that finding, it could have believed, in light of defendant's profits, that only a large award would be proportionate to the harm that defendant caused"); *Waddill*, 27 P.3d at 1099 ("It is common knowledge that broken glass is dangerous and can cause serious injuries. We cannot say that it is

involve death or physical injury, this circular approach renders the ratio guidepost a nullity in such cases.

Once again, the present case is illustrative. The court below expressly reasoned that "the importance of the [ratio] factor is somewhat reduced" and affirmed the $290 million punitive exaction notwithstanding the 63:1 ratio on the ground that the multimillion dollar "wrongful death compensatory damages do not fully reflect the harm to the victims." Pet. App. 39a. In other words, the court evaded the ratio guidepost by beginning with an already large compensatory award and then positing that, because people died, the compensatory damages necessarily understate the actual harm to the plaintiffs — this despite the fact that California imposes no cap on either economic or non-economic damages.

Other courts, though not expressly jettisoning the ratio guidepost entirely, have disregarded this Court's statement in *BMW* that there is no single ratio that fits all cases and instead have reflexively assumed that, when the ratio is in the single — or even double — digits, no further analysis is necessary to conclude that the punitive award comports with due process. In *Smith*, for example, the Kentucky Supreme Court apparently felt that it had discharged its duty under *BMW* by reducing the punitive award from a ratio of approximately 7:1 to 5:1. See *Sand Hill Energy*, 83 S.W.3d at 496. It accordingly gave no consideration to whether a 5:1 ratio that yields a $15 million punitive exaction is indicative of excessiveness in view of such factors as the absence of a financial motive for designing the

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excessively disproportionate to punish a company that makes glass products that can cause the degree of damage that plaintiff suffered by an award that is no more than ten times the actual injury that its actions caused."); *Ford Motor Co.* v. *Ammerman*, 705 N.E.2d 539, 562 (Ind. Ct. App. 1999) (affirming ratio of 2.73:1 on $4 million compensatory award and 18.25:1 on $400,000 compensatory award because, "[u]nlike *Gore* the injuries suffered by the plaintiffs in this case are physical, permanent, and severe").

transmission as Ford did, the fact that Ford's design was identical to those of most other automakers, the fact that NHTSA repeatedly has found the design not to be defective, and the fact that numerous juries have exonerated Ford of even compensatory liability for the design. See Pet. for Cert. at 6-7, *Ford Motor Co.* v. *Estate of Tommy Smith*, No. 02-1096.

This Court already has indicated that high ratios like the one in *BMW* weigh in favor of a finding of excessiveness when damages are not small and the conduct, albeit an intentional tort, is not egregious. It also has identified several circumstances in which a high ratio of punitive to compensatory damages may be justified: when "a particularly egregious act has resulted in only a small amount of economic damages"; when "the injury is hard to detect," suggesting that the defendant could have expected to escape liability for its conduct and be underdeterred as a result; and when "the monetary value of noneconomic harm might have been difficult to determine," prompting concern that the defendant has not been made to internalize the full social costs of its conduct and thus has been underdeterred. *BMW*, 517 U.S. at 582. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877-900 (1998) (explicating economic theory of deterrence). The Court has not, however, had the opportunity to fill in other boxes in the matrix. Most notably, it has not addressed the situation presented here and in other products liability cases in which the harm is not intentional, the compensatory damages are themselves in the seven figures and far exceed any rational (and fairly apportioned) measure of the defendant's "ill-gotten" gain from its conduct, and there is no possibility that the harm would go undetected.

The present case and *Ford* v. *Smith* together present this Court with an ideal opportunity to provide further guidance regarding proper application of the ratio guidepost in this recurring context. Although the ratios in the two cases are dramatically different — 63:1 and 5:1 — both cases afford the

Court the opportunity to expound on the circumstances in which even a modest ratio may be indicative of an excessive punishment. In both cases, the defendant concededly did not act with malicious intent; in both cases, the source of the harm was not difficult to detect, obviating any concern that the defendant might escape liability for tortious conduct; in both cases, the compensatory damages are largely noneconomic and run into the millions of dollars, making it unlikely that the award understated the injury; and in both cases, the compensatory damages far outstrip the amount the defendant could be said to have "gained" by virtue of choosing the design at issue over the one proffered by the plaintiffs' expert.

In this case for example, the evidence was that the cost of including a roll bar in 1978 and 1979 Broncos would have been $10 to $12 per vehicle. When multiplied by the total number of Broncos sold without a roll bar, the amount that Ford can be said to have saved by choosing the design that it did rather than the alternative design proposed by plaintiffs' expert is in the range of $1,485,000 to $1,782,000 — a fraction of the $6.2 million in compensatory damages that plaintiffs received, even without any additional punitive award.[10] In *Ford* v. *Smith*, it is a matter of common sense that Ford saved ***nothing*** by choosing to locate the point of hydraulic release where it did.

It is a matter of common sense and wide judicial and scholarly recognition that, in such circumstances, the compensatory damages ordinarily suffice to achieve appropriate

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[10] Although for purposes of illustrating our point, we have calculated the "gain" by reference to the total number of 1978 and 1979 Broncos sold nationwide, we do not mean to suggest that it would be permissible for a jury in an individual case, applying the law of a single state, to seek to remove the entire gain from the nationwide sale of a product. Not only would that violate the prohibition against extraterritorial punishment articulated in *BMW;* it also would fail to account for the exoneration and excessive aggregate punishment problems discussed in Section D, *infra*.

deterrence.[11] It follows that even a 1:1 ratio may therefore reflect that the punitive award is excessive in relation to the state's interest in deterrence. Self-evident though these concepts may seem, however, not a single reviewing court confronted with a punitive award in the products liability context has even contemplated the possibility that the factors present in such a case may mandate that a lower ratio be regarded as the dividing line between a permissible and an unconstitutional punishment. Review is warranted to provide

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[11] See, *e.g.*, *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence * * * operates through the mechanism of damages that are compensatory") (emphasis omitted); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Maiorino* v. *Schering-Plough Corp.*, 695 A.2d 353, 370 (N.J. Super. Ct. App. Div. 1997) (concluding that "the large compensatory damage award to Maiorino of $435,000 by itself provided significant deterrence even to an employer as large as Schering" and holding therefore that "[a]n $8,000,000 punitive damage award was not necessary to punish Schering or to deter it and other employers from engaging in the type of conduct found to be discriminatory by the jury"); Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2082 (1998) ("Compensatory damages work well for deterrence if and only if it is easy to identify the injurer, bring suit, and collect full damages. Under these conditions, the wrongdoer faces liability for the full social costs of the wrong. Thus there is no need for additional damages if the probability of detection and successful suit for compensation is 100%."); George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 La. L. Rev. 825, 831 (1996) ("[T]he strongest theory in the modern tort academy is that full compensatory damages generate exactly the optimal level of deterrence of accidents — not too little and not too much. For purposes of deterrence or accident prevention, there is no need for punitive damages of any dimension, not to mention unlimited punitive damages, given the availability of full compensatory damages.") (footnote omitted).

needed guidance with respect to this guidepost.

C. The Lower Courts Need Guidance As To The Proper Application Of The Third Guidepost When The Plaintiff Seeks To Analogize The Defendant's Design Decision To A Crime Punishable By Imprisonment.

The decision below also is emblematic of a recurring misapplication of the third *BMW* guidepost, which calls for a comparison of the punitive award with "civil or criminal penalties that could be imposed for comparable misconduct" (517 U.S. at 583). Eschewing the congressionally established fine for marketing defective vehicles,[12] the court of appeal equated Ford's design decision with "involuntary manslaughter" (Pet. App. 35a), and reasoned that the third guidepost was therefore entirely "inapplicable" (*id.* at 39a). It explained: "Such a comparison [with civil fines] is appropriate when the conduct to be punished cannot result in imprisonment if committed by an individual, but is inappropriate when the malicious conduct could result in substantial imprisonment if committed by an individual instead of a corporation." *Ibid.* Other courts likewise have used this rationale to nullify the third guidepost or to invoke it affirmatively as justification for multimillion dollar punishments.[13]

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[12] In 1978 and 1979, the model years in question, the maximum fine for selling an entire fleet of defective vehicles nationwide was $800,000. 49 U.S.C.A. § 30165(a) (West 1997).

[13] See, *e.g.*, *Bielicki* v. *Terminix Int'l Co.*, 225 F.3d 1159, 1166 (10th Cir. 2000) (refusing to give weight to $5,000 civil penalty under FIFRA and explaining that, "[a]lthough the punitive damages award is exceptional when compared only to the applicable fines, the authorization of imprisonment in the criminal context can justify a higher award"); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 2001 WL 1246676, at *17 (Utah Oct. 19, 2001) (disregarding applicable fines for unfair insurance practices in part because "State Farm's officers could be imprisoned" for those practices), cert. granted, 122 S. Ct. 2326 (2002); *Cass* v. *Stephens*, 2001 WL 28092, at *33 (Tex.

Because virtually any tort can be restated as a crime, analysis of this sort would remove all limitations on punitive damages in products liability actions, and, indeed, in any case involving personal injuries. If Ford's conduct here can be equated with the crime of involuntary manslaughter, so can any wrongful death case in which punitive damages are awarded. A reviewing court could vitiate the constitutional guidelines recognized in *BMW* in any personal injury case by equating the conduct with battery or mayhem, crimes that also can carry prison sentences. And any tort causing property damage could be analogized to malicious mischief. Indeed, the same over-generalizing logic could characterize the conduct in *BMW* as criminal fraud — for which offenders can be imprisoned. By this device alone, decisions like the one in this case render the third *BMW* guidepost a dead letter. In the event the Court does not reach this issue in *State Farm*, the present case is an ideal vehicle for doing so.

D. The Lower Courts Need Guidance Regarding The Proper Application Of The *BMW* Guideposts When The Plaintiff Has Encouraged The Jury To Punish The Defendant For The Effects Of Its Design Decision On Individuals Who Are Not Before The Court.

Another feature of products liability cases that renders it essential for this Court to give plenary consideration to such a case is the fact that hundreds of thousands if not millions of other people will have used or come into contact with the product for which the plaintiff is seeking to impose punishment. Indeed, the recitation of the number of other units on the market or other people injured by the product is a routine feature of closing arguments in such cases, as both the present case and *Ford* v. *Smith* well illustrate. See Pet. for Cert. at 3-4, 25 n.12; Pet. for Cert. at 5, 15-16, *Ford Motor Co.* v. *Estate of Tommy*

Ct. App. Jan. 11, 2001) (upholding $5 million and $2.5 million punitive awards in oil and gas accounting case in part because theft of property is punishable by imprisonment).

Smith, No. 02-1096. But, with the encouragement of plaintiffs' counsel, juries and reviewing courts consistently act as if the case before them is the only one in which the defendant will be or has been sued, while paradoxically assuming that the product is injuring or is likely to injure multiple people, for which fact the defendant should be severely punished.

This kind of approach presents twin problems of constitutional magnitude. On the one hand, if a verdict that is not limited to punishing for the injury caused to the particular plaintiff is aberrational — either because the product has not in fact injured anyone else or because the defendant has been vindicated in the preponderance of other cases alleging the same defect — it necessarily will overpunish the defendant in violation of due process. In addition, to the extent it overrides the determinations of juries in other states, such a verdict violates the deeply embedded constitutional principle that states are co-equal sovereigns. *BMW*, 517 U.S. at 571-573; see also *White* v. *Ford Motor Co.*, 312 F.3d 998, 1013-1020 (9th Cir. 2002). On the other hand, if other juries have in the past or could in the future impose punitive damages against the defendant for the same design, allowing the punishment to be predicated on or sustained on the basis of statistics about the number of units sold or the number of people injured is a recipe for an excessive aggregate punishment that violates the defendant's due process rights.[14]

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[14] For a more detailed treatment of these and related problems associated with the propensity of courts to allow punishment to be based on the fact that the defendant's conduct may have affected other individuals who are not before the court, see Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner, *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, No. 01-1289 (argued Dec. 11, 2002). For a recent scholarly treatment of this subject, see Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) (arguing that there is no historical basis for — and the

Once again, the present case and *Ford* v. *Smith* are perfect illustrations of these dual problems.[15] In the present case, it is undisputed that no other court or jury — in 25 years — has ever found the design defect alleged here. See Pet. for Cert. at 4 n.2. Yet plaintiffs sought and received a punishment that removed the total profits from the sale of all 1978 and 1979 Broncos ***three times over***. In upholding this enormous exaction, the court of appeal took no account of the fact that the verdict might have been an aberration; nor did it consider the possibility that, if anyone else ever were to be injured as a result of the roof design, that person might be entitled to his or her own punitive damages award, presumably again calculated with reference to the number of vehicles marketed with this design.

In *Smith*, the record reflects that numerous other juries had vindicated Ford in cases in which plaintiffs had claimed a defect in the design of its transmission. See Pet. for Cert. at 7,

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Constitution forbids — allowing juries to impose punitive damages for injuries to individuals other than the plaintiff).

[15] There are many other examples of cases in which courts demonstrated no concern about the aberrational verdict and excessive aggregate punishment problems. See, *e.g.*, *Williams*, 48 P.3d at 839, 841 (reinstating $79.5 million punitive award in tobacco case in part because it was "reasonably inferable from the evidence that defendant's products * * * caused a significant number of deaths each year in Oregon during the pertinent time period," while g ving no weight to fact that other juries in both Oregon and elsewhere had been and would continue to be asked to punish defendant for the same conduct); *Ammerman*, 705 N.E.2d at 560-564 (upholding $13.8 million punitive award derived from amount it would have cost defendant to retool its factories in order to remedy the defect, notwithstanding fact that other juries had exonerated defendant); *Owens-Corning Fiberglas Corp.* v. *Ballard*, 739 So. 2d 603, 607 (Fla. Dist. Ct. App. 1998) (giving no weight to fact that defendant had 7,000 pending claims against it, in course of upholding $31 million punitive award), approved, 749 So. 2d 483 (Fla. 1999).

Ford Motor Co. v. *Estate of Tommy Smith*, No. 02-1096. In addition, NHTSA, the expert federal agency, has repeatedly declined to find the very defect upon which respondent's judgment rests. *Id.* at 6-7, 23 n.9. In such circumstances, it is the height of unfairness to allow a litigant in an individual case to deprive Ford of its vindications by prevailing upon the jury to punish it on behalf of all 200 people who plaintiff alleged were killed as a result of Ford's design choice.

The consequence of allowing any one jury that power is to ensure that, sooner or later, every manufacturer of any product that is involved in a non-negligible number of injuries will be subjected to at least one and maybe several enormous punitive exactions — even if, as in this case, it appears that no other person has ever alleged the defect found by the jury or, as in *Smith*, the vast majority of juries have concluded not only that the defendant did not act with an egregious mental state but that the product was not defective at all. In other words, a run-away jury in a single case could arrogate to itself the power to make a once-and-for-all determination that a product should never have been placed on the market — thus wiping out all of the other jury verdicts and regulatory findings exonerating the defendant. Review is warranted to provide the lower courts with needed guidance regarding this important, recurring issue in products liability cases.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
Allegiance Healthcare Corporation
Altec Industries
Altria Group, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Ansell Healthcare, Inc.
Appleton Papers, Inc.
Astec Industries
Aventis Pharmaceuticals
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP Amoco Corporation
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Bristol-Meyers Squibb Company
Brown and Williamson Tobacco
Brown-Forman Corporation
Caterpillar Inc.
CCA Industries, Inc.
Centerpulse USA Inc.
Chevron Corporation

Compaq
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Delphi Corporation
Dorel Juvenile Group, Inc.
E & J Gallo Winery
E.I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
ExxonMobil Corporation
FMC Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
GlaxoSmithKline
GLOCK, Inc.
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.

Joy Global, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors North America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Sears, Roebuck and Co.
Shell Oil Company
Siemens Corporation
Smith & Nephew, Inc.
Snap-on Incorporated

Sofamor Danek, Medtronic Inc.
Solutia Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Textron Inc.
The Dow Chemical Company
The Goodyear Tire & Rubber Company
The Heil Company
The Procter & Gamble Company
The Sherwin-Williams Company
Thomas Built Buses, Inc.
Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW, Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Whirlpool Corporation
Wilbur-Ellis Company
Wyeth
Yamaha Motor Corporation, U.S.A.
Zimmer, Inc.

(This list is current as of March 24, 2003)

Supreme Court, U.S.
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APR 7 2003
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No. 02-109[illegible]

In The
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fifth Appellate District

BRIEF OF AMICI CURIAE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AND ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Alliance of Automobile Manufacturers, Inc. (Alliance) is a nonprofit trade association composed of 10 car and light truck manufacturers: BMW Group, Daimler-Chrysler Corporation, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mitsubishi Motors North America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc., and Volkswagen of America, Inc. Alliance members account for more than 90 percent of U.S. vehicle sales.

The Association of International Automobile Manufacturers, Inc. (AIAM) is a trade organization whose members include American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Maserati North America, Inc., Mitsubishi Motors North America, Nissan North America, Peugeot Motors of America, Saab Cars USA, Renault, SA, Subaru of America, and Toyota Motor Sales, U.S.A. AIAM also represents original equipment suppliers and other automotive-related trade associations.[1]

The members of the Alliance and AIAM – automotive manufacturers and suppliers – may be the most affected by the punitive damages laws of this country. The products they

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by the Alliance and AIAM and was written entirely by their counsel.

make – automobiles – move fast and crash, and severe injuries can occur in them in all kinds of ways even when they are perfectly designed. And under principles of both law and engineering, the designs manufacturers choose must reflect judgment calls about risks and benefits, which by definition make risks to some more likely if risks to others are to be avoided. Members of the Alliance and AIAM are frequently sued by injured people who seek, based on their particular injuries, to have their cars deemed defective by lay juries – often advocating as alternatives the very designs attacked by others. And plaintiffs often ask the jury, based on the isolated facts of their case, to punish the manufacturer for design decisions made years (sometimes decades) before.

This scenario is played out again and again, in court after court, state after state, design after design. And the results are, truly, random. Designs deemed non-defective in one case are found defective and punishable in another. And the punitive amounts – although spiraling ever upward – bear no relationship to anything except jury whim.

This Court's cases have sought to clarify the Constitution's limits on the availability and size of punitive damages and the territorial scope of a state's power to impose them. But at least in the field of automotive product liability, those limits have not prevented arbitrary imposition of punitive damages. The members of the Alliance and AIAM accordingly have a strong interest in the Court's consideration of *Ford Motor Co. v. Romo,* No. 02-1097, and

Ford Motor Co. v. Smith, No. 02-1096[2] (as well as *Clark v. Chrysler Corp.*, 310 F.3d 461 (6th Cir. 2002), in which a petition for a writ of certiorari is soon to be filed), as they provide an opportunity to resolve the constitutional issues concerning punitive damages in product liability cases.

SUMMARY OF ARGUMENT

The *Romo* and *Smith* petitions give the Court an opportunity to provide badly needed guidance to end what is now a rule of essentially random imposition of punitive damages, in randomly large amounts, against product manufacturers. The automotive industry has been building ever safer cars, but facing ever greater punishment. The verdicts are arbitrary: designs that meet federal safety standards promulgated by the National Highway Traffic Safety Administration (NHTSA) are deemed dangerous and punishable; designs exonerated by one jury are deemed grounds for punishment by another. And the amounts awarded are untethered to any rational basis – a design found to have caused death may trigger punishment of $3 million to over $1 billion. Such irrational results and random punishment do not, and by their nature cannot, accomplish the legitimate purposes of punitive damages, and indeed, occasion the arbitrary deprivation of property that the Constitution condemns. This Court's guidance is badly needed.

[2] Given the similarity of issues in *Romo* and *Smith*, the Alliance and AIAM are filing similar briefs supporting petitioner in each case.

ARGUMENT

The twin cases before the Court – *Romo* and *Smith* – are not aberrations. The automotive industry has been subjected to random imposition of punitive damages, in huge amounts, with respect to designs that meet industry standards, that exceed federal safety standards, that NHTSA itself has investigated and not found defective, and that have been found safe by other juries. A punitive damages system that allows such "arbitrary deprivation of property" and punishment by definition does not meet due process. *Honda Motor Co. v. Oberg,* 512 U.S. 415, 432 (1994). Punitive damages law is broken. These cases provide the Court with an opportunity to fix it.

The sole purposes of punitive damages are to punish past, and deter future, wrongdoing. *Cooper Indust., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 432 (2001); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 21-22 (1991). Both purposes depend on reasonable notice of what conduct will trigger punishment. A manufacturer cannot be deterred from one design choice and encouraged to adopt another unless it can foresee which choice will trigger, and which will avert, punishment. Indeed, it is simply unfair to punish a manufacturer for conduct that was, or reasonably appeared, lawful when and where it occurred. Yet, in a product design setting, where designs and legal tests for defect are based on engineering trade-offs and judgment calls, notice of what is and is not a proper design is, in the best of circumstances, elusive.

Punitive damages in product cases – especially the massive awards in cases like *Romo* and *Smith* – reflect the problem. As the Court cautioned in another automotive case, "Punitive damages pose an acute danger of arbitrary

deprivation of property" and juries may "use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg,* 512 U.S. at 432. Automobile manufacturers are large companies. Some are foreign manufacturers to boot. These companies' wealth, and distance from individual juries, put them at risk for unwarranted punishment, especially where plaintiffs are sympathetic and injuries are severe.

The Court in *BMW of North America v. Gore,* 517 U.S. 559 (1996), articulated minimum Due Process requirements designed to assure that punitive damages fairly served their purposes without arbitrary, unfair punishment. "Elementary notions of fairness," the Court held, entitle a defendant to "fair notice not only of the conduct that will subject [it] to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. The Court laid down three guideposts for measuring punitive damages under the Due Process Clause. 517 U.S. at 574-85.

The *Gore* standards, however, developed in a case involving economic loss, have not controlled runaway verdicts in personal injury product liability litigation. Juries continue to impose – and courts continue to affirm – unpredictable, even conflicting, punishments, often for good-faith conduct, apparently lawful at the time. The result is arbitrary punishment, without reasonable notice of what conduct will be punished, or how much, or how to avoid punishment in the future.[3]

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[3] It is no answer to say that manufacturers have notice they should avoid defective designs. The test for defect involves judgment calls

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The Alliance and AIAM file this brief to alert the Court to what is really happening to the automotive industry without meaningful punitive damages controls, so the Court can understand why the *Romo* and *Smith* cases represent both a real and pervasive problem in the lower courts, and an opportunity for this Court to correct that problem.

I. UNPREDICTABLE, CONFLICTING PUNITIVE DAMAGES AWARDS.

As this Court observed in *Gore,* "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. In actual practice, however, the current constitutional standards permit irrational and even contradictory results, especially in product liability cases where manufacturers cannot avoid design tradeoffs. Such random punishment does not – and by definition cannot – accomplish any legitimate purpose.

For example, in *Smith,* the Kentucky Supreme Court reinstated a $15 million punitive damages award based on a transmission design susceptible to shifting from Park to Reverse. This misshift risk cannot be eliminated from an automatic transmission; as a matter of physics, there is a

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about safety, utility and cost that are subject to debate. A manufacturer choosing a design cannot predict whether a jury in some future case will deem that judgment call reasonable or punishable. In practice, juries do both.

midpoint between Park and Reverse. At least 15 juries had found Ford's transmission not defective at all and the federal safety agency, the National Highway Traffic Safety Agency (NHTSA), had specifically investigated and not found any defect. (*See Smith* Petition at 6-7) In addition, the Virginia Supreme Court had held punitive damages unavailable as a matter of law in a similar misshift claim against Ford, even as it affirmed compensatory liability. *Ford Motor Co. v. Bartholomew,* 297 S.E.2d 276, 683-84 (Va. 1982); *cf. General Motors Corp. v. Sanchez,* 997 S.W.2d 584, 595-98 (Tex. 1999) (affirming compensatory liability but holding punitive damages unavailable as a matter of law in misshift claim against General Motors). Thus, different juries and courts have variously found misshift susceptibility not to be a defect at all; defective but not punishable; and punishable.

And in *Romo,* the California Court of Appeal reinstated a $290 million punitive damages verdict for a roof design in use for a quarter-century, that had never been found defective in any case – and in fact, far from causing widespread harm, had never even been the subject of a lawsuit, much less a judgment. Indeed, the roof design was ahead of its time, far surpassing federal roof-strength regulations first adopted several years later – regulations that, by definition, "meet the need for motor vehicle safety." 49 U.S.C. § 30111(a).

The *Romo* and *Smith* cases do, and should, give pause about the need for additional guidelines to protect against arbitrary punishment. Due process should foreclose punishment when different engineers (and juries) can reach different conclusions on a design's merits. For by definition, where reasonable minds can believe a design is safe, there is no basis for finding wantonness in its use,

and no way to predict its adoption will be punished. Due process should foreclose punishment when a manufacturer complies with an on-point federal standard. For Congress has mandated that NHTSA adopt standards that are "practicable" and "meet the need" for motor vehicle safety. 49 U.S.C. § 30111(a). Compliance with an on-point safety standard, even if not a defense as a matter of law to liability, by definition negates the evil intent required for punitive damages and makes punishment inappropriate; indeed, a finding that a complying design reveals evil intent is an ad hoc indictment of NHTSA's own good faith – something no case should allow and no manufacturer should be charged with predicting. Without these kinds of constitutional safeguards, irrational and arbitrary punishment will be routine.

Indeed, *Romo* and *Smith* are not unique; they are the norm. Take the case of Nissan's experience with claims of "unintended acceleration" in its 300ZX car. "Unintended acceleration" is when a car accelerates when the driver does not intend it to accelerate. Most all cars have been the subject of such claims. The problem is most often pedal error: the driver hits the gas instead of the brake. Nissan had won at least three jury verdicts, two directed verdicts and a summary judgment in cases alleging a defect-caused unintended acceleration in Nissan's 300ZX car.[4] After

[4] *Ammel v. Nissan Motor Co., Ltd.*, San Diego County (Calif.) Superior Court No. 577345 (Feb. 20, 1991) (jury verdict of no design defect); *Silverman v. Swenson*, Orange County (Calif.) Superior Court No. 522924 (Nov. 5, 1991) (jury verdict of no design defect); *Rinck v. Nissan Motor Co.*, Hamilton County (Tenn.) Circuit Court No. N-33587 (July 30, 1990) (jury verdict for Nissan); *Robertson v. Nissan Motors Corp. in U.S.A.*, Los Angeles County (Calif.) Superior Court No. C666570 (Aug. 13, 1991) (directed verdict); *Gallo v. Nissan Motor Corp.*,

(Continued on following page)

investigation, Nissan believed the reports were caused by pedal error. NHTSA also had investigated such claims in hundreds of 300ZX cars, found "no safety related defect," and also determined that incidents were likely caused by pedal error. Far from ignoring the problem, Nissan committed $30 million to retrofit the cars to protect against pedal error. Nonetheless, in *Nissan Motor Co., Ltd. v. Armstrong,* 32 S.W.3d 701, 710-11 (Tex. App. 2000), *pet. for review filed* (Tex. Feb. 21, 2001) (No. 01-0030), a Texas jury held that the same unintended acceleration incidents, which NHTSA and Nissan found to be caused by drivers' pedal errors, proved a throttle design defect. The jury then imposed punitive damages on the theory that Nissan was indifferent to safety because it agreed with NHTSA on the likely cause of the incidents and committed $30 million to addressing that cause, rather than changing a throttle part that neither thought was the cause. The Texas Court of Appeals affirmed a $2 million punitive damages award.

Clark v. Chrysler Corp., 310 F.3d 461 (6th Cir. 2002), is another example of punitive damages gone awry. There, a car's door latch separated in a collision, allowing the door to open, and plaintiff's decedent to be ejected from the vehicle. NHTSA had adopted a standard for door latch strength, a standard explicitly designed "to minimize the likelihood of occupants being thrown from the vehicle as a result of impact." 49 C.F.R. § 571.206 S1. Chrysler's latch was twice as strong as NHTSA's standard required. Nonetheless, a jury imposed punitive damages and the

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Los Angeles County (Calif.) Superior Court No. SEC63128 (Apr. 19, 1990) (directed verdict); *Bonanno v. Jordan,* United States District Court for the District of Vermont No. 2:92-CV-333 (Aug. 30, 1991) (summary judgment).

Sixth Circuit (over dissent) affirmed them, on the ground that NHTSA's strength requirements were not adequate for real accidents. 310 F.3d at 469, 481; *see* 310 F.3d at 483 (Nelson, J., dissenting). Thus, just as manufacturers cannot count on avoiding punitive damages by complying with their own engineering judgments, even when repeatedly validated by juries, neither can they count on NHTSA's independent judgment.

The law, amici respectfully submit, thus affords no real notice of the conduct that will subject a manufacturer to punitive damages if it allows juries to both exonerate and punish a manufacturer for adopting the same design – or to punish as maliciously dangerous designs far exceeding expert standards that already "meet the need for motor vehicle safety." 49 U.S.C. § 30111(a).

Indeed, carmakers are sometimes subject to punitive damages no matter what choice they make. For example, in *Romo*, the punitive damages award was affirmed in part because Ford changed the challenged design. Ford reinforced the roof in a later model year Bronco, which, the California Court of Appeal reasoned, proved Ford acted reprehensibly in using the prior roof in 1978. *Romo* Pet. App. 35a. The message: No good deed goes unpunished. *See also General Motors Corp. v. Johnston,* 592 So.2d 1054, 1060 (Ala. 1992) (affirming, as reduced, punitive damages based on evidence that GM "attempt[ed] to correct the problem" while failing to notify buyers).[5]

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[5] Indeed, this reasoning points up the need for territorial limits on punitive damages. Federal Rule of Evidence 407, and many like state rules, forbid consideration of subsequent design changes on liability. It

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Yet other cases hold punitive damages justified because the manufacturer did ***not*** change the design. *E.g., American Motors Co. v. Ellis,* 403 So.2d 459, 467 (Fla. App. 1981) (punitive damages justified because, although aware of danger, "AMC chose not to implement the recommendation of its engineers to relocate the fuel tank"); *Wangen v. Ford Motor Co.,* 294 N.W.2d 437, 462 (Wis. 1980) (punitive damages appropriate because Ford did not change design of gas tank and surrounding components despite known fire hazard); *see Armstrong,* 32 S.W.3d at 710-11 (affirming punitive damages because Nissan allegedly knew part could fail and cause unintended acceleration, but did not issue mandatory retrofit or special warning).

These cases send exactly the wrong message. They tell manufacturers that even designs found safe by juries or that comply with on-point NHTSA standards that by Congressional mandate must "meet the need for motor vehicle safety" will be punished; that automakers cannot escape punitive damages whether they keep designs or change them; that no matter what choices they make and how often they are vindicated by juries they will be punished eventually in some case; and that punitive damages are accordingly simply a random risk and an inescapable cost of doing business.

That turns the purposes of punitive damages upside down. The law justifies punitive damages on the basis that they are meant to shape conduct. They cannot shape

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is perverse indeed if one state, like California, can impose nationwide punishment based on the very design innovation that federal (and other states') law seeks to encourage and so refuses to punish.

conduct if they are imposed whatever the conduct and no conduct can predictably protect against them. And punishing manufacturers for products they reasonably believed reasonably safe, *i.e.* lawful – which belief was supported by NHTSA standards and investigation reports, industry standards, and numerous jury verdicts – is fundamentally unfair and violates the notice requirement of the Due Process Clause. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher,* 238 U.S. 482, 490 (1915) ($6,300 civil penalty violated "fundamental principles of justice," even if the defendant "should have known that the Supreme Court of the State in the exercise of its judicial power might hold [its conduct] unreasonable," where "the prevailing view elsewhere was otherwise").

In short, *Romo* and *Smith* are not unique. They reveal a devastating lack of controls on punitive damages in the lower courts, which prevents punitive damages from serving their legitimate purposes – fair retribution and deterrence. The result is the very "arbitrary deprivation of property" that *Oberg* condemns as a violation of due process. The Court should grant review to set specific guidelines, and limits on the availability of punitive damages, that prevent such random punishment.

II. ENORMOUS AWARDS THAT EVISCERATE THE *GORE* FACTORS.

Even where some punitive damages are appropriate, the Due Process Clause "imposes substantive limits" on the amount of punitive damages. *Cooper,* 532 U.S. at 433-34; *Gore,* 517 U.S. at 585-86. In deciding whether the line has been crossed, courts must focus on the defendant's degree of reprehensibility or culpability, the relationship

between the penalty and the harm to the victim caused by the defendant, and the sanctions in other cases for comparable misconduct. *Gore,* 517 U.S. at 575-85; *see Cooper,* 532 U.S. at 440.

Ford's petitions in *Romo* and *Smith* demonstrate that the *Gore* guideposts provide no real or consistent controls on the amount of damages in product liability cases. Perhaps because the *Gore* factors were developed in a case that did not involve personal injuries or engineering judgments, the lower courts in automotive product liability struggle with them. Some cases apply the guideposts, some ignore them, and some discard them. (*Romo* Pet. 9-23; *Smith* Pet. 21-30) The arbitrary award of crushing amounts, on top of random imposition of punitive liability, makes the absence of controls doubly offend due process.

Again, *Romo* and *Smith* are not alone. A single case demonstrates that there is no practical limit on punitive damages in product liability cases. In *Anderson v. General Motors Corp.,* Los Angeles County (Calif.) Superior Court No. BC 116926, *notice of appeal filed,* No. B135147 (Cal. Ct. App. Sept. 9, 1999), people injured in a post-collision fire sued GM, claiming that placement of the gasoline tank behind the rear axle created an excessive danger of fuel-fed fire in the event of a crash. The vehicle met all relevant requirements for rear-end crashworthiness, and the fuel tank was in the same location as 98% of the other vehicles marketed. Nevertheless, the jury not only found the tank defective, it awarded $4,800,000,000 ($4.8 billion) in punitive damages. The trial court, purporting to apply *Gore*, reduced it to a mere $1.09 billion.

That judgment, even as reduced, was 218 times greater than any California award in any published case (before *Romo*) and 19 times greater than any punitive

damage award ever affirmed in any federal court in any reported case. One year's post-judgment interest alone would be 22 times the largest award ever affirmed in a reported California case (again before *Romo*) and almost twice the largest ever affirmed in a reported federal case. No one – literally, no one – could have foreseen in the 1970s, when the tank was designed, that a manufacturer would be subjected to over a billion dollars in punishment.

The results in real cases prove there are no practical controls on the amount of punitive damages in product liability cases. Punitive damages awards are random; in just the last few years, punitive damages in automotive product liability cases against the big three American auto manufacturers (GM, Ford and Chrysler) have included $3 million (*Clark*), $15 million (*Smith*), $290 million (*Romo*), and $1.09 billion (*Anderson*). The ratio between the high and low awards – over 300 to 1 – for similar claims (alleged defects that cause severe injuries or death) and similar sized companies alone confirms that existing law provides no controls.

Massive punitive awards like *Romo*'s $290 million award, for designs that complied with federal standards and had never before caused injury, demonstrate that punitive damages have spiraled out of control in automotive litigation. Judges' failure to rein them in demonstrates that current constitutional standards do not provide sufficient lower court guidance. Indeed, the *Smith* majority opinion unintentionally proves the problem. The Kentucky Supreme Court there observed that "the reality" of "national experience" facing an automaker is that a $15 million punitive damages award is reasonably foreseeable. (*Smith* App. 19a) This circular "reality," in which each enormous award justifies the next, is the problem, not the answer.

The *Romo* and *Smith* cases give the Court an opportunity to set substantive due process limits on imposition of punitive damages, define jury instructions that will help assure adherence to those substantive limits, explain the territorial reach of jury awards, and clarify the reviewing courts' duty to control jury excesses. The Court should grant certiorari to provide that specific guidance on the constitutional limitations on punitive damages.

CONCLUSION

For these reasons, the Alliance and AIAM respectfully urge the Court to grant the Petitions.

DATED: April 7, 2003

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BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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Bradley D. Toney, *The Chaotic and Uncertain Due Process Challenge to Punitive Damages*, 30 Williamette L. Rev. 635 (1994) 7
Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919 (1989) 13

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. Many of its supporters are consumers and shareholders of Ford Motor Company and other publicly traded companies; accordingly, they would be adversely affected by the award of the excessive punitive damages in this and other cases.[1]

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorneys' fee awards. WLF appeared as amicus curiae in almost all of the major punitive damages cases before this Court, including *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. ___ (Apr. 7, 2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

In addition, WLF has published numerous articles on punitive damages. *See, e.g.*, Arvin Maskin, *et al.*, *A Punitive Damages Primer: Legal Principles and Constitutional Challenges* (Washington Legal Found. Monograph, 1994); Victor E. Schwartz, *et al.*, *Multiple Imposition of Punitive Damages: The Case For Reform* (Washington Legal Found. Working Paper No. 50, 1992); Theodore B. Olson & Theodore J. Boutrous, *The*

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[1] Pursuant to this Court's Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution to the preparation and submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

Constitutionality of Punitive Damages (Washington Legal Found. Legal Backgrounder 1989).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of law, including law and public policy. AEF has appeared as amicus curiae before the U.S. Supreme Court in numerous cases as co-amicus with WLF that are relevant to this case, including *BMW of N. Am. Inc. v. Gore* and *Pacific Mut. Life Ins. Co. v. Haslip*.

WLF and AEF believe that they can bring a broader perspective on the issues presented in this case which will assist the Court in deciding whether to grant the Petition. Amici believe that the arguments presented in their brief also provide compelling reasons for granting review in the companion case of *Ford Motor Company v. Smith*, No. 02-1096. Consequently, amici urge the Court to grant both Petitions.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the Statement of the Case as presented in the Petition. In brief, this case involves the constitutionality of a punitive damages award of $290 million to the plaintiffs as a result of injuries and deaths suffered from a single automobile accident that occurred in 1993 when the roof of a 1978 Ford Bronco they were riding in collapsed during the rollover.

The court of appeal upheld this unprecedented award which was approximately 63 times the compensatory award, 362 times the maximum available civil fine, and 29,000 times the maximum criminal fine. The California Supreme Court denied review by a vote of 4-3.

REASONS FOR GRANTING THE PETITION

In *BMW v. Gore*, 517 U.S. 559 (1996), this Court held that in order to pass muster under the Due Process Clause, the size of punitive damage awards must be measured against three guideposts: (1) the degree of reprehensibilty of the tortious conduct; (2) the disparity or ration between the harm and the punitive damages awarded; and (3) the level of civil or criminal penalties that could be imposed in comparable cases. To help ensure that these guideposts are not easily ignored, this Court in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), held that a reviewing court must conduct a searching *de novo* review of the *BMW* excessiveness factors.

In the instant case, the jury imposed, and the appellate court upheld, a gargantuan punitive damages award of $290 million, unprecedented even by California standards, for a design defect in the roof of Ford's 1978 Bronco which was involved in an accident 15 years later. The jury concluded that a defective roof design was a cause of the injuries and deaths suffered by the vehicle's occupants. While the Petitioner presents compelling reasons why this Court should review and reverse the award as a clear violation of the *BMW* guideposts and the proper level of judicial review under *Cooper Industries*, amici will focus their brief on the related issue raised by the Petitioner, namely, that the *BMW* guideposts cannot be easily disregarded by a jury or a reviewing court by considering the wealth of the corporate defendant. The wealth of the defendant is irrelevant for determining either the appropriate punishment or retribution to be meted out, as well as for determining the amount necessary for deterrence purposes.

Alternatively, if the Court believes that the financial information regarding the defendant can be used in computing the punitive damages award, it should make it

clear that the relevant information that may be used consistent with due process are the profits associated with the particular tortious conduct in question, namely, the costs saved from Ford's failure to adopt an alternative design that would have allegedly prevented the injuries. Even if the entire profits from the product can be considered instead of the differential in the cost savings from the roof design, the out-of-state conduct and associated profits cannot be considered in computing punitive damages as the lower court mistakenly did.

I. THIS COURT SHOULD GRANT REVIEW TO MAKE IT CLEAR THAT THE OVERALL WEALTH OF THE DEFENDANT CORPORATION MAY NOT BE TAKEN INTO ACCOUNT IN ASSESSING OR REVIEWING PUNITIVE DAMAGE AWARDS; TO DO SO WOULD BE INCONSISTENT WITH DUE PROCESS, THE *BMW* GUIDEPOSTS, AND THE PURPOSES OF PUNISHMENT AND DETERRENCE.

In the instant case, the lower court upheld the $290 million punitive damages award which it characterized as a "huge windfall" to the plaintiffs (and their attorneys), because "California regards it as necessary to impose penalties related to the wealth of the defendant in order to achieve the goals of punishment and deterrence." Pet. App. 36a. The court considered Ford's net worth of $25 billion, and its daily after-tax profits of $20 million. *Id.* Nationwide profits of the 1978 and 1979 Broncos amounted to $100 million. The court then sought to minimize the $290 million windfall because the amount represented only "1.2 percent of Ford's net worth and nine days of its profits at the time of trial." Pet. App. 37a.

California is not unique in considering the wealth of the corporate defendants to justify huge punitive damage awards, and more juries and courts will likely follow California's example if this decision goes unreviewed. As the Petitioner noted, other lower courts have justified multi-million dollar punitive damage awards on the basis of the large wealth of the corporate defendant. *See* Pet. at 20, n.10 (citing cases upholding multimillion dollar punitive damages awards based on wealth of the defendant). However, other jurisdictions (including those in which thousands of 1978 and 1979 Ford Broncos were sold) forbid consideration of wealth of the defendants.[2]

Unfortunately, faced with tempting opportunities to redistribute wealth from large corporations (particularly from those that are out-of-state) to individual plaintiffs, the lower court and many other courts are barely paying lip service to the *BMW* guideposts, let alone conducting meaningful *de novo* review as required by *Cooper Industries*. Accordingly, this case presents the Court with an excellent opportunity to curb the not-so-subtle violations of the due process rights of "wealthy" defendants.

As this Court reiterated just today, "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. ___ (Apr. 7, 2003), slip op. at 17. On prior occasions, this Court and many of its Justices have observed that the imposition of punitive damages "pose an

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[2] *See, e.g., Michigan Peisner v. Detroit Free Press*, 242 N.W. 2d 775 (Ct. App. Mich. 1976); *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 764 (Ky. Ct. App. 1974); *Smith v. Colorado Interstate Gas. Co.*, 794 F. Supp. 1035, 1044 (D. Col. 1992). *Yund v. Covington Foods, Inc.*, 193 F.R.D. 582, 589 (S.D. Ind. 2000) (holding that "a corporate defendant's net worth is irrelevant to the assessment of punitive damages against it").

acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth create the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences." *Honda v. Oberg*, 512 U.S. at 432; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (Rehnquist, C.J., Blackmun, Stevens & Kennedy, JJ.) ("[E]mphasis on the wealth of the wrongdoer increase the risk that the award may been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident."); *id.* at 490 (White, O'Connor & Souter, JJ. dissenting) ("That a jury might have such inclinations [to redistribute wealth form large corporations] should come as no surprise. Courts long have recognized that jurors may view large corporations with great disfavor."). As one commentator noted:

> Evidence of a defendant's net worth can lead to a punitive damages award based on bias, prejudice, or passion. Introduction of such evidence by plaintiffs is, at bottom, "an improper 'appeal to class prejudice and pandering to the perception that corporations wield disparate power,'" generally made for no reason "'other than to prejudice . . . the jury's sworn duty to reach a fair, honest and just verdict.'"

Victor E. Schwartz, *et al.*, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brooklyn L. Rev. 1003 at 1006 (1999).

Not only are jurors prone to exact large punitive damage awards against corporations because of their size, judges are also prone to sanction the practice. Judicial review by state courts cannot be relied upon to remove the risk of excessive punitive damage awards against large out-

of-state corporations due to bias. Judge Richard Neely, author of the opinion of the West Virginia Supreme Court of Appeals in the *TXO* case, has candidly explained the pressures on state judges as follows:

> After all, I'm not the only appellate judge who wants to sleep at night. As long as I'm allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone elses' money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will re-elect me.

Richard Neely, *The Product Liability Mess: How Business Can Be Rescued form the Politics of State Courts* 4 (1989), *quoted in* Bradley D. Toney, *The Chaotic and Uncertain Due Process Challenge to Punitive Damages*, 30 Williamette L. Rev. 635, n.306 (1994).

Amici submit that this Court should grant review in this case to clarify that consistent with due process, the wealth of the defendant cannot be used to justify huge punitive damage awards.

A. Imposing Large Punitive Damage Awards Based upon the Wealth of a Corporate Defendant Does Not Serve the Principles of Punishment or Retribution

Under California law and the law in many other jurisdictions, punitive damages are awarded to punish the defendant and to deter it and others from engaging in the offending or harmful conduct. The purpose of punishment or retribution is to inflict only the level of sanctions necessary to vindicate societal interests in condemning the offending conduct that occurred in the past. Deterrence, on

the other hand, is designed to prevent the defendant and others from engaging in the offending conduct in the future. A penalty imposed for deterrence purposes, however, can also serve a punitive function.

A proper analysis of these two rationales for imposing punitive damages suggest that wealth of the defendant cannot, and should not, be taking into account, particularly where, as here, the defendant is a large publicly held corporation. This Court's discussion in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 257 (1989) about the appropriateness of imposing punitive damages upon municipal corporations is instructive with regard to the question of imposing punitive damages on commercial corporations.

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. * * * Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. * * * A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the

> governmental entity itself. * * * Whatever its weight, the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages.

City of Newport, 453 U.S. at 267 (footnote omitted).

Amici submit that just as with municipal corporations, punishing large publicly-held corporations like Ford inflicts punishment "only [on] the [shareholders], who took no part in the commission of the tort." 453 U.S. at 267. Furthermore, "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing [shareholders]. *Id.* Finally, since a corporation is a fictional entity, it "can have no malice independent of the malice of its [officers, directors, managing agents, and employees]." "Damages awarded for punitive purposes, therefore, are not sensibly assessed against the [corporate] entity itself." *Id.* As Circuit Judge Easterbrook noted:

> Corporations * * * are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992). *See also Lane v. Hughes Aircraft Co.*, 22 Cal.4th at 427 (Brown, J., concurring) ("Many of the wealthiest defendants are corporations, and the size of a corporate

defendant is not an additional evil that in itself warrants an enhance penalty.").

Even though the *Zazu* case dealt with punitive damages based on federal law, the principle should apply to state law claims as well. As Judge Easterbrook subsequently observed, "even when considering punitive damages based on state law [*in BMW*], the Supreme Court did not treat the defendant's wealth as relevant. Basing a decision [regarding punitive damages] on income and assets not only is inconsistent with the privacy interests that usually protect those details * * * but also calls into question the courts' commitment to do equal justice to the rich and the poor.[3] *Pivot Point International, Inc. v. Charlene Products, Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation).

The American Law Institute Reporters also have presented cogent reasons as to why a defendant's assets are irrelevant to the issue of punitive damages:

> The defendant's assets are irrelevant for several reasons. First, most sizable corporations deploy their wealth in a variety of unrelated business ventures; in deed, it is often only an accident of the corporate structure that places this wealth in the hands of the particular defendant entity. Second, use of the wealth factor may impose unjustifiable sanctions on corporations which incur proportionately more instances of wrongdoing simply because of their greater *volume* of business.

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[3] *Cf. Brown v. Legal Foundation of Washington*, 2003 U.S. LEXIS 2493 at *59 (Scalia, J., dissenting (criticizing the majority's "Robin Hood Taking[s]" Clause as sanctioning the extraction of wealth from those who own it to fund indigent legal services).

> Finally, the actual burden of imposing a higher legal penalty on account of size cannot be borne by the formal corporate entity and will rarely be borne by the officials actually responsible; instead, the burden ultimately falls on the shareholder, customer, or worker constituencies of the firm, who often are not especially wealthy.

2 Am. L. Inst., *Reporters Study, Enterprise Responsibility for Personal Injury*, 255 (1991).

Amici submit that the "wealth card" dealt by plaintiffs' lawyers to the jury and "reviewed" by the appellate court should not trump the rational guideposts provided by this Court in *BMW*. The resulting awards appear to be, and most likely are, based on passion and prejudice, and result in wildly disparate awards in lottery-like fashion, depending upon the fortuity of the forum and composition of the jury.[4] This Court should not tolerate this arbitrary basis for huge punitive damage awards any more than the court should

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[4] One commentator noted with regard to the role of the jury:

> According to the Court [in *Cooper*], "unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." If one takes this statement at face value, litigants no longer have a right to have a jury determine the amount of punitive damages. To the extent that modern juries function solely as fact finders, the assessment of a punitive damage award, at least as to the amount, is outside the purview of the jury.

Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F.L. Rev. 411 (2002).

tolerate the imposition of a large criminal fine on a defendant simply because he could afford it.

The court below dismissed the due process objection to the use of Ford's wealth in the punitive damages calculus on the grounds that Ford was on notice that wealth of a defendant is a factor under California law and California court decisions such as *Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910, 582 P.2d 980 (1978). But clearly Ford had no notice of what its wealth would be some 20 years after the alleged misconduct occurred. Furthermore, the notice by the government that it intends to act in an arguably arbitrary and unconstitutional way in the future does not constitute sufficient notice to cure the underlying due process violation.[5]

B. Basing and Justifying Huge Punitive Damage Awards on the Company's Overall Wealth Does Not Properly Serve Deterrence Principles

The usual reason given for imposing multimillion dollar punitive damages awards is that a wealthy company will internalize those costs as simply a cost of doing business. But that simplistic reaction often goes unchallenged. Assuming that a company and its officers are motivated purely by economic greed and the bottom line, it doesn't

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[5] For example, in the context of deciding whether the Takings Clause has been violated in a particular case, the government's argument that the property owner had no investment-backed expectation because the property was acquired *after* the (confiscatory) regulation was enacted, and thus the new owner had notice, is no bar to a claim by the owner that a regulatory taking has nevertheless occurred. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, n.2 (1987).

make sense for a company to continue to engage in liability causing conduct until the punitive damage awards reach astronomical proportions. While the lower court may have been correct in observing that determining the proper amount of a punitive damage award is not an exact science, there remains a substantial body of scholarly economic research suggesting that the optimal levels of fines necessary to deter socially undesirable conduct are not related to the size or net wealth of the company. From an economic point of view, it is generally understood that:

> [P]rofit-maximizing organizations are interested in the marginal (not the total) costs of activities relative to the marginal benefits. The total wealth of the organization generally has little to do with the expected marginal costs or benefits of actions. It has been argued that, by linking punitive damages to wealth, the law creates too much deterrence for large corporations and too little for small ones.

Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 Univ. of Chicago Law Rev. 179, 210 (1998).[6] As explained by two prominent experts in the field:

> Deterrence theory is based on the * * * assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will compare the benefits it will derive from an action

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[6] *See also* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 Ala. L. Rev. 1143, 1176-77 (1989); *Malcolm E. Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-51 (1989); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 62 (1982).

> that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is likely, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the threat of tort liability. A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any adjustment in the level of sanction needed to offset that expected value. The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct.

Kenneth S. Abraham & John Calvin Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth,* 18 J. Legal. Stud. 415 (1989). Deterrence is deemed effective if it removes the gain from the wrongful behavior, regardless of its net worth, assets, or income. As Judge Easterbrook cogently described it:

> Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings? Absolute size, like net worth, also is a questionable reason to extract more per case. * * * If a larger firm is more likely to commit a wrong on any given transaction, then its total damages will increase more than proportionally to its size without augmentation in any given case; if a larger firm is equally or less likely to commit a tort per transaction, then the court ought to praise the managers rather than multiply the firm's penalty. Consider: General Motors is much larger

> than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car. Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this, and the court in this case had none.

Zazu, *supra*, 979 F.2d at 507. Stating it more succinctly, it's "as if having a large net worth were the wrong to be deterred!" *Id.* at 508.

If deterrence is the goal, that goal can be achieved with a large compensatory award and no, or a relatively small, punitive damages award. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. ___ (Apr. 7, 2003), slip op. at 18 (in light of substantial compensatory damages awarded, a punitive damage award "at or near the amount of compensatory damages" could meet the *BMW* standards). As one California Justice observed:

> [E]ven for a large corporation, a relatively modest punitive damage award may be sufficient to induce an end to the offensive conduct. Moreover, above a certain level, the precise amount of a defendant's wealth becomes less relevant, compared to other factors, in determining an appropriate punitive damage award. Accordingly, trial courts should not permit attorneys to argue [or reviewing courts to sanction] that punitive damages should be a fixed percentage of the defendant's total net worth.

Lane v. Hughes Aircraft Co., 22 Cal.4th at 427 (Brown, J., concurring).

C. Even If the Jury Can Consider Financial Information of the Corporation, the Relevant Information Is the Gain Realized Attributable to the Wrongful Conduct That Occurred Within the State; Anything More Violates Due Process and Exceeds the Deterrent Interests of the State.

To protect the due process rights of defendants and to serve the interests of the State in achieving deterrence, it is vitally important that trial courts and reviewing courts carefully assess the amount of the punitive damage award to ensure that it is not excessive. As this Court said in *BMW*, the "sanction * * * cannot be justified on the ground that it was *necessary* to deter future misconduct *without considering whether less drastic remedies* could be expected to achieved that goal." 517 U.S. at 584 (emphasis added). This standard is similar to the standard required under California law as stated by the court below: "'The key question before the reviewing court is whether the amount of damages 'exceeds the level *necessary* to properly punish and deter.'" Pet. App. 34a (*quoting Neal v. Farmers Ins. Exchange*, *supra,* 21 Cal. 3d at 928 (emphasis added). Stated differently, both California law and due process principles forbid the imposition of punishment that *exceeds* the level "necessary" to accomplish its goals of punishment and deterrence. If the punishment is excessive, it becomes gratuitous, arbitrary, overdeters, and violates due process.

The lower court in the case at bar shirked its duty under *Cooper Industries* to scrutinize the punitive damages award *de novo* by stating the obvious: "It is empirically impossible, of course, to know *exactly* the level of punitive damages that would have a sufficient punitive and deterrent effect without unduly stifling innovation and competition in the marketplace." Pet. App. 36a. Claiming that any determination of the award is "somewhat arbitrary," the

court simply deferred to the judgment of the jury and trial court. The court noted that because Ford allegedly "had use of its 1978-79 Bronco profits of over $100 million for 20 years prior to the verdict, we cannot conclude the level of damages is excessive." Pet. App. 37a. But even assuming that these nationwide profits are indeed relevant at all to the calculus, the court did not even bother to consider whether "less drastic remedies" would be sufficient to punish and deter; instead, the court arbitrarily relied on Ford's nationwide Bronco profits.

Unlike the court below, other courts have taken heed of *Cooper's de novo* review responsibilities. In *Kimzey v. Wal Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997), for example, the plaintiff successfully brought a sex discrimination claim against Wal Mart for the repeated and grossly offensive conduct constituting sexual harassment which went unremedied by management. The jury awarded $35,000 in actual damages for constructive discharge and $50 million in punitive damages. The trial court reduced the punitive damages to $5 million, and on appeal, the Eighth Circuit reduced it further to $350,000. Even though Wal Mart had net assets at the time of $32 billion, the punitive damage award amounted to roughly .001% of the net assets. (A comparable percentage in this case based on Ford's net worth of $25 billion would amount to $250,000).

Even though the jury was given general instructions under Missouri law that punitive damages were to both punish and serve as a deterrence, the trial court properly set aside 95% of the original $50 million award, and on appeal, the reviewing court reduced the $5 million by 93% more to arrive at $350,000. To be sure, the ratio of punitive to actual was a seemingly large 10 to 1, but the actual damages was not in the multimillion dollar category where much smaller ratios under *BMW* serve as a important guidepost.

In the case at bar, the court of appeal did not consider whether a smaller punitive damage award of, say, $100 million, or $50 million, or even $10 million, would necessarily serve the principles of punishment and deterrence. As far as the court was concerned, the comparable fines guidepost in *BMW* was inapplicable because a death occurred, and the reprehensibility factor in the case could override all other considerations. Under the lower court's rationale, if the jury had returned a $500 million, or even a billion dollar punitive damages award as requested by the plaintiffs' attorney, that would be just fine with the court as well. While it may be "empirically impossible" to know the "exact" level of proper punitive damage, clearly the court could have determined whether the award was even in the ballpark in the order of several magnitudes. *De novo* review must certainly mean more than what the lower court engaged in.

Amici also agree with Petitioner that this Court should clarify the constitutional limits on the power of the State to punish out-of-state sales and profits, consistent with principles of federalism and the Commerce Clause. The issue is especially appropriate for review in light of a clearly conflicting opinion in *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002) where nationwide sales of the defective vehicle could not be considered.

But even if the jury and the court could measure the punitive damages on the basis of the number of vehicles, either in California or nationwide, the proper and more accurate measure for deterrent purposes should be marginal costs saved, not the entire profits from the product. In *Copper Industries*, this Court quite correctly recognized that the punitive damages should be correlated not to the entire sales of the product in question, but only to the profits associated with the misconduct at issue. 532 U.S. at 442. In this case, the record shows that the cost savings between

the "defective" roof design and the one offered by the plaintiffs' expert was $10-12 a roof. The amount of cost savings would have been $1.8 million. Pet. at 23.

In any event, even if total Bronco profits are the right measure, the court below brushed aside the allocation of in-state versus out-of-state sales by Petitioner because "any 1978 Bronco operated *on California highways* creates the same risks to its occupants no matter where the vehicle was sold nor where its occupants reside." (emphasis added). Yet this falsely assumes that *all* 150,000 Ford Broncos sold in 1978 and 1979 were sold in and/or operated on California highways. For this reason alone, Ford's due process rights were violated by punishing Ford for extraterritorial conduct. For all we know, and for all the lower court could care, the 1978 Bronco in the case at bar could have been the only one sold in or operated on California highways.

CONCLUSION

This Court should not shirk from its responsibility to enforce its decisions that substantively limit the award of excessive punitive damages. As one commentator has noted:

> If society constructs rules of law that are known to inflict punishment that is undeserved, the community itself is guilty of a kind of theft.
>
> * * *
>
> Legal thefts seem even more pernicious than private thefts because of the more active role of the community in accomplishing them: they are "group thefts," which violate the trust of individual citizens that the law will be as fair as possible in concept and execution.

David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 723 (1989).

To allow an award of this magnitude to go unreviewed for conduct where experts differ as to the fault of defendant, where the jury vote as to whether it should even assess punitive damages was 9-3, and where the Supreme Court of California itself declined review by a narrow 4-3 vote, would be to endorse the arbitrary deprivation or theft of property belonging to the shareholders of Ford without due process.

For the foregoing reasons, and those presented by the Petitioner, the petition for writ should be granted.

Respectfully submitted.

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In The
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The Fifth Appellate District

SUPPLEMENTAL BRIEF IN OPPOSITION RESPONDING TO *AMICUS CURIAE* BRIEFS IN SUPPORT OF FORD MOTOR CO.

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INTRODUCTION

The *amicus* briefs from various automobile manufacturers and business groups that do not like punitive damage awards share several characteristics. First, very little in the briefs is about this case. No *amicus* brief examines the volumes of virtually uncontradicted evidence proving that when Ford rushed the Bronco to gain market share, it knew, before selling the vehicle to the public, that the Bronco could kill seat-belted occupants in a rollover accident. No *amicus* brief disputes the California Court of Appeal's conclusion that the defendant's malicious misconduct amounted to "manslaughter." *Romo v. Ford,* 99 Cal.App.4th 1115, 1150-1151 (2002). Thus, glaringly absent from the *amicus* briefs is any concern about the need for punitive damages in a case in which a defendant knowingly marketed a product that failed its own safety standards and that needlessly killed three people and risked tens of thousands of deaths.

Instead, the briefs are filled with discussion of cases decided around the country, which the briefs imply were wrongly decided. *See, e.g., Amicus* Brief of the Product Liability Advisory Council, et al., at 11 n.9, 15 n.11, 19 n.15; Brief of Twenty Leading Non-Automotive Companies, 8, 12-16, App.B. Perhaps those cases warrant certiorari, when and if it is requested. But unlike *amici*'s characterization of those cases, the Court of Appeal here engaged in exactly the *de novo* review required by *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), of each constitutional guidepost set forth in *BMW of North America v. Gore*, 517 U.S. 559 (1996).

Second, the briefs are striking in their failure to give any deference to juries, state courts, or state laws. The briefs are filled with hyperbolic references to run-away juries and even run-away courts of appeals. *See, e.g., Amicus* Brief of the Alliance of Automobile Manufacturers, Inc., et al., at 5 (speaking of "run-away verdicts"); *Amicus* Brief of the Product Liability Advisory Council, at 9, 20 (describing the California Court of Appeal as "simple-minded" and speaking of a "run-away jury.") The briefs

show profound disrespect for juries and their role in our constitutional system, for state courts, and for state governments. In this way, the *amicus* briefs are inconsistent with the prior rulings of this Court and with basic principles of federalism.

Many of the briefs propose significant changes concerning when punitive damages should be available and how they should be measured. *Amicus* Brief of the Washington Legal Foundation, et al., at 16 (urging changing the method of calculating punitive damages); Brief of Amici Curiae National Association of Independent Insurers, et al., 4 (proposing new approach to determining when punitive damages are allowed). These arguments are appropriate for lobbying efforts directed to state legislatures; they are not a basis for finding that the state court decision violated due process.

Third, a central theme of all the *amicus* briefs is a call for the Court to clarify the law of punitive damages. *See, e.g.*, *Amicus* Brief of the Product Liability Council, at 2. But subsequent to the submission of these briefs, this Court's decision in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 2003 WL 1791206 (April 7, 2003), provided much of the clarification *amici* requested. For example, the *amicus* briefs called for this Court to grant certiorari to clarify the standards for determining reprehensibility, evaluating the allowable ratio between punitive and compensatory damages, assessing the relevance of other sanctions, and ascertaining the ability of a jury to award punitive damages for conduct occurring in other states. All of this is found in *State Farm v. Campbell*.[1]

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[1] Respondent Romo is simultaneously filing a separate supplemental brief explaining why the Court of Appeal decision in this case is entirely consistent with *State Farm v. Campbell* and why this recent decision is not a basis for a grant of certiorari or a remand to the California courts.

ARGUMENT

I. CERTIORARI IS UNJUSTIFIED BECAUSE THE COURT OF APPEAL PROPERLY ENGAGED IN *DE NOVO* REVIEW IN CONCLUDING THAT THE PUNITIVE DAMAGE AWARD WAS NOT GROSSLY EXCESSIVE

The most glaring omission from all of the *amicus* briefs is their failure to address the manner in which the Court of Appeal engaged in *de novo* review in this case. After reviewing all of the evidence, the Court of Appeal concluded that it was "frivolous" for Ford to contend that its conduct was not sufficiently "vile" or "loathsome" to support an award of punitive damages. *Romo v. Ford Motor Co.*, 99 Cal.App.4th 1115, 1144-1145 (2002). The Court of Appeal concluded that substantial evidence showed Ford "acted with malice in its design and introduction into the market of the 1978 Bronco." *Id.* at 1146.

The Court of Appeal then conducted the *de novo* review and found: 1) that "defendant's conduct was grossly reprehensible" in that it "placed tens of thousands of lives at risk and actually claimed three such lives in the present case"; 2) the ratio between the punitive and compensatory damages was justified in light of the enormous harms caused and risked by the defendant; and 3) the punitive damages should be compared not just to the civil fines in a case where the conduct was criminal and where imprisonment would be imposed on an individual committing such involuntary manslaughter. *Id.* at 1151.

Under *Cooper Industries,* a key check on punitive damages awards is *de novo* appellate review. That is exactly what occurred in this case.

II. BECAUSE THE COURT OF APPEAL APPLIED THE TEST PRESCRIBED BY THIS COURT, AND SINCE THE DAMAGES AWARDED IN THIS CASE ARE PERMISSIBLE UNDER THIS TEST, THERE IS NO BASIS FOR A GRANT OF CERTIORARI

A. The Court of Appeal Appropriately Found That Ford's Conduct Was "Grossly Reprehensible"

A jury, after lengthy deliberation, found Ford guilty of "malicious conduct," and a Court of Appeal on *de novo* review, found Ford's conduct to be "grossly reprehensible." Nothing in the *amicus* briefs provides a basis for questioning this conclusion.

1. The *Amicus* Brief of the National Association of Independent Insurers, et al., at 4, urges this Court to hold that punitive damages are *per se* unavailable if there "is reasonable disagreement as to the propriety of the defendant's conduct." First, California law, requiring that a jury find by clear and convincing evidence that the defendant acted with malice, already encompasses protection for reasonable conduct. If there were "reasonable disagreement" over the defendant's conduct, then the jury would not find, as it did here by clear and convincing evidence, that the defendant was guilty of "vile," "despicable," and "malicious" conduct disregarding public safety. Ultimately, whether there is "reasonable disagreement" is a factual question to be resolved by the jury, as it was here.

Second, there was no such "reasonable disagreement" in this case. Ford's representative, Al Darold, who worked on the 1978 Bronco, admitted that Ford knew that its roof would fail in a rollover accident. Ex-Ford Vice President Thomas Feaheny said that in his 26 years at Ford, the 1978 Bronco was the "worst" vehicle he ever saw in terms of its lack of rollover crashworthiness. RT 3381:22-3382:1, 3524:13-26. Ford's safety department documents show that Ford knew from studying thousands of accidents and conducting its own tests before producing the 1978 Bronco that it did not have necessary rollover bars and roof

strength and that tens of thousands of lives would therefore be at risk.

2. Many of the *amicus* briefs argue that alleged compliance with existing federal safety standards should always preclude a finding of reprehensibility. *See, e.g.*, Brief of *Amici Curiae*, Alliance of Automobile Manufacturers, at 3, 7; Brief of *Amici Curiae* National Association of Independent Insurers, at 11. First, National Highway Transportation Safety Act (NHTSA) standards were never intended to prevent common law liability. Since its inception in 1966, the NHTSA has provided that: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." *See* former 15 U.S.C. §1379(k), now found at 49 U.S.C. §30103(e). NHTSA standards are "minimum standards" for the sale of an automobile in the United States and were never intended to alter the possibility of "tort liability to encourage development of safety features." *Ketchum v. Hyundai Motors,* 49 Cal.App.4th 1672, 1679 (1996) (citing S.Rep. No. 1301, 89th Cong., 2d Sess., 2720 (1966)).

Second, alleged "compliance" with NHTSA standards is not even an issue in this case because no federal roof crush or stability safety standards applied to the 1978 Bronco when Ford manufactured the vehicle. Those standards would have been irrelevant in any case because Ford knew that the 1978 Bronco would roll over more than other passenger vehicles and that its roof would "fail" in such a rollover. Indeed, Ford disregarded its internal roof strength standards and produced the first passenger sedan in its history with no steel in the roof's "D" pillar. Ford performed no pre-production roof crush tests at all on the 1978 Bronco, and none of the tests that Ford told the NHTSA in 1973 were necessary to assess vehicle stability. *See, e.g.,* RT 2324:4-2325:17; 2401:26-2402:1; 2796:8-2797:23. In fact, Ford had intentionally "misled" the NHTSA about rollover and roof crush hazards to avoid the enactment of such safety regulations. RT 3247:16-3252:17; RT 3258:21-3259:7; 3386:2-3387:1; Exhibit 302:241, p. 2.

3. Many of the *amicus* briefs argue that a finding of reprehensibility is inappropriate because all products involve dangers. The *Amicus* Brief of the Alliance of Automobile Manufacturers, et al., at 2, argues against a finding of reprehensibility by arguing that automobiles "move fast and crash, and severe injuries can occur in them in all kinds of ways even when they are perfectly designed." But the 1978 Bronco, far from being "perfectly designed," was, according to expert testimony at trial, the "worst ever" in terms of rollover crashworthiness. Exhibits 2-4:5; RT: 4922:11-4933:14. The Romo family would have "walked away" if Ford had just met its own internal safety engineering standards.

Similarly, the *Amicus* Brief of the National Association of Independent Insurers, et al., argues that "ultimate safety is not feasible." But "ultimate safety" was never the issue in this case. Deaths could have been prevented from the 1978 Bronco with rollover bars costing between $10 and $12 per vehicle.

4. Many of the briefs argue that the Court of Appeal found reprehensibility solely because deaths were involved in the case. *See, e.g., Amicus* Brief of the Product Liability Advisory Council, at 4-5 (marketing of a product that risked personal injury was determined "reprehensible per se"); *Amicus* Brief of the National Association of Independent Insurers, et al., at 15 (the presence of physical injury or death was used to "automatically put the defendant high on the reprehensibility scale"). This mischaracterizes both the jury's conclusions and the Court of Appeal's analysis. Ford's conduct was not deemed reprehensible *per se* or found reprehensible just because there were deaths. Ford's actions were found to be "malicious" because Ford designed and marketed the 1978 Bronco after removing the basic protections such as a roll bar and a reinforced roof knowing that the unstable vehicle would needlessly cause deaths and serious injuries.

5. Many of the briefs discuss the relationship of punitive damages to safety improvements. The *Amicus* Brief of the Alliance of Automobile Manufacturers, et al.,

at 10, asserts that Ford was punished for changing the design of its Bronco in 1980 showing that "[n]o good deed goes unpunished." The *Amicus* Brief of Mercedes-Benz, USA, at 6, says that punitive damage awards punish innovative safety technology. But the "innovation" in the 1980 Bronco was merely putting steel, a rollbar, in that vehicle's "D" pillar. Placing steel in a roof is not innovation. All Ford passenger sedans, before and after the 1978 Bronco, had steel in the "D" pillars.

Thus, Ford knew before adding steel reinforcement to the roof design on the 1980 Bronco that those safety improvements were needed on the 1978 Bronco. Ford knew that its competitor Chevy had already put two steel roll bars in the 1976 Blazer. Ford's top-level executives reached a "consensus" that such a roll bar was needed on SUVs before the Bronco was produced. Ford even planned on using an "integral roll bar" in the 1978 Bronco and tested a prototype. But Ford took the roll bar design out to rush the Bronco to market and left the "hump" in the roof where the roll bar was supposed to be to make the Bronco "appear" strong. Punitive damages here did not punish innovations as *amici* argue; they were awarded to punish and deter future deliberate disregard of public safety in failing to include basic safety technology Ford knew would save lives.

B. The Court of Appeal Appropriately Found that the Ratio Between the Punitive and Compensatory Damages Did Not Show that the Award Was Excessive

Many of the briefs argued that there is a need for the Court to clarify the appropriate ratio between compensatory and punitive damages. *See, e.g., Amicus* Brief of the Product Liability Council, et al., at 13. This Court provided this clarification in *State Farm;* the Court, in part, stressed that there is no "bright-line" ratio rule and that larger ratios are appropriate where there is particularly "egregious" conduct and where compensatory damages are inadequate or involve a relatively "small amount of economic

damages." 2003 WL 1791206, at 11. Critically important here is that "the level of compensatory damage awards in personal injury cases may be too low in practice to accomplish proper deterrence." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 941-42 (1998). Compensatory damages in wrongful death cases are generally calculated as a survivor's financial loss and this amount generally will not lead to proper deterrence. Philip J. Cook & Daniel A. Graham, *The Demand for Insurance and Protection: The Case of Irreplaceable Commodities,* 91 Q.J. Econ. 143, 144-45 (1977); *see* William Landes & Richard Posner, The Economic Structure of Tort Law 187 (1987) (damage rules in wrongful death actions undervalue human life). The Court of Appeal emphasized exactly this point in this case and noted that California "tort law, for historical reasons, undervalues noneconomic damages and the compensatory damages award is not a reliable measure of the injury to the victim." 99 Cal.App.4th at 1147.

The *Amicus* Brief of the Product Liability Advisory Council, et al., at 11, asserts that the jury viewed "high compensatory damages [as] automatically justifying high ratios and large punitive damage awards." But that is not at all what occurred in this case. The Court of Appeal stressed that the large punitive damage award was justified because the defendant's conduct was malicious, amounting to manslaughter; the "defendant ignored its own internal safety standards while leaving the Bronco with the appearance of incorporating a roll bar into the vehicle's roof structure"; and "wrongful death compensatory damages do not fully reflect the harm to the victim." 99 Cal.App.4th at 1148, 1151.

C. The Court of Appeal Appropriately Considered Other Sanctions for Ford's Conduct

Some of the *amicus* briefs criticize the Court of Appeal's consideration of other sanctions in this case. *See, e.g., Amicus* Brief of Twenty Leading Non-Automotive Companies at 12 (the lower court in *Romo* "practically

ignored the third BMW guidepost.") To the contrary, the Court of Appeal noted that Ford's "malicious conduct could [have] result[ed] in substantial imprisonment if committed by an individual instead of a corporation," and that California punitive damage jurisprudence gave Ford ample "notice" of the possible penalty. 99 Cal.App.4th at 1151-52. This is a case where due process was satisfied because both substantial civil and significant criminal penalties could have been imposed.

D. The Court of Appeal's Consideration of Ford's Overall Wealth In Determining the Punitive Damage Award is Consistent with the Decisions of this Court and Every Court

Contrary to the assertions in the *amicus* briefs, the Court of Appeal did not uphold the punitive damage award solely based on the wealth of the defendant. *See* The *Amicus* Brief of the Washington Legal Foundation, et al., at 7-15. In fact, the Court of Appeal explicitly acknowledged that "a defendant's wealth cannot be the sole criterion for the size of a punitive damages award." 99 Cal.App.4th at 1152. Thus, Ford's "net worth" was only considered as an additional factor in evaluating the propriety of the award in this case. Such consideration is entirely consistent with this Court's punitive damage decisions.

Further, the *amici* briefs ignore the fact that California law focuses on both "[t]he profits the defendant has gained by virtue of the wrongful course of conduct," as well as "[t]he financial condition of the defendant." Cal. Civ. Code §3295(a). Here, without objection from Ford, the plaintiffs at trial proved that Ford reaped over $1.076 billion in profits from the 1978-79 Bronco.

The *Amicus* Brief of the Washington Legal Foundation, et al., at 4, urges this Court to adopt a new rule that punitive damages be limited to the amount the defendant gained from not putting the additional safety measures in the product. Saving $10-$15 by not using a steel "D" pillar would warrant less punishment than omitting an expensive innovation. Such a rule makes no sense. Moreover,

there is no authority to support such a rule and no basis for finding it to be a constitutional requirement. *Amicus* offers no justification for finding that this radical change in the law is required by due process of law.[2]

Respectfuly submitted,

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[2] The *Amicus* Brief of the Washington Legal Foundation, at al., at 19, also urges this Court to limit punitive damages to conduct that occurred within the state. Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, at 21-28, addresses this issue at length, explaining that Ford waived its right to challenge the admission, use, and consideration of profits on the 1978-79 Bronco; that the jury did not punish out-of-state conduct in this case; and an award which includes consideration of profit from malicious conduct presents no constitutional issue.